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**The Ethics of Judicial Rhetoric:**  
**The role of liberal moral principles in**  
**law.**

by

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requirements for the degree of Doctor of Philosophy in  
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## **Declaration**

I declare that this is my own work. It has not been submitted for a degree at another university.

David Gurnham.



## Abstract

This thesis is a study of the relationship between deontological liberal principles and consequentialism in legal rhetoric. The argument developed is that these supposedly separate bases for judgment are actually mutually defining in cases involving an apparent ethical dilemma. The content of a principle cannot be known *a priori*, since its interpretation gains its persuasive force from a calculation of the benefit and detriment of a potential decision. We argue that, in order to prevent the deontological authority of liberal principles from being undermined by such a mixing, consequentialist calculations are themselves made by appealing to an interpretation of principled arguments. The effect of this symbiosis of principle and consequentialism is that ethical problems are resolved in legal rhetoric by assigning conflicting parties a higher or lower status within a moral hierarchy that prioritises those that assimilate more closely to the liberal ideal of the reasonable, responsible individual. This assignation itself requires the weighing up the possible consequences of this or that interpretation of the relevant principles and the ‘facts’ of the parties’ moral status. The characterisation of judicial rhetoric as a narrative of what we might call moral consequentialism leads on to a deconstructive turn in the second half of the thesis. We seek to show that the relationship between principle and consequence is not simply one of binary opposition, but rather of *undecidability*. The implications of such a destabilisation of the line between apparently distinct concepts for political and ethical theory is recognised and addressed in the final chapters. We consider how deconstruction both poses dangers and also creates new possibilities for critique. The final move of the thesis is to consider the ethical implications of our critique of law’s moral hierarchy. We argue that emphasising the undecidability of law’s moral hierarchies allows for new perspectives on ethical problems.

## Introduction

These introductory remarks attempt to provide an indication of some of the foundational assumptions of the thesis. There are two major themes introduced here. Considered first is the relationship between facts and values as concepts central to the argument of the thesis. The distinction and relationship that is identified as between these concepts gives some indication of how my argument will unfold and what presuppositions it makes regarding the roles of interpretation and justification in legal judgment. The second theme introduced here is the choice of liberalism as a theoretical starting point: why liberalism as opposed to any other perspective? The third section of this introduction provides an outline of the structure of the thesis.

### *1. The Possibility of an Ethical Perspective on Law: Facts and Values*

An initial problem is the relationship between the two key concepts studied in this thesis: between facts (here, facts of the cases and also considerations of possible consequences of particular judgments) and values (liberal principles). This is a relationship that is given central prominence in the argument of this thesis, as it attempts to identify a close connection within legal rhetoric between assertions as to what is ‘true’ (i.e. what are the facts of a case and what consequences will result from this or that course of action) and what is ‘right’ (i.e. what matters of principle guide the process of judgement). It cannot be denied that such an attempt faces certain theoretical objections. As Stanley Fish



points out,<sup>1</sup> western philosophy since Plato has been preoccupied with matters of verification: ‘how can we know that x is true?’ One of the more radical objections to considering both facts and values as this thesis does is the suggestion that, since comments on values do not refer definitely to anything in the empirical world, we can never know whether they are true or false and are therefore literally meaningless. Such is the position of the logical positivists, for whom questions and statements can only make sense if there is a possibility of empirical verification.<sup>2</sup> The specific objections raised by logical positivism will not be discussed in this thesis, but the wider issue of verification with regard to a supposed distinction between facts and values is a relevant concern and deserves some introduction here. It is argued in the following chapters that ‘principled’ judgments are made possible because matters of ‘principle’ (value) and matters of ‘fact’ are interpreted in the light of each other. The distinction drawn by logical-positivists between facts and values is rejected here because, as is argued in the chapters, no independent or objective empirical verification exists even for the factual propositions made in the cases. The empirical world of ‘facts’ is not treated as an objective source of verification to which ethical statements have no recourse, but rather as a ‘text’ in the post-modern sense: as that which must be read and interpreted in the light of the multiplicity of other sources which contribute towards the making of decision. Both categories are treated as subject to the ravages of rhetoric, politics and context. There is no clear distinction made as between statements for verification and the sources of

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<sup>1</sup> See Chapter Six, note 58; Fish (1989) *Doing What Comes Naturally: Change Rhetoric and the Practice of Literary and Legal Studies*, Duke University Press, pp.482-4

<sup>2</sup> See Ayer, A.J. *Language, Truth and Logic* (Harmondsworth: Penguin, 1980)

verification since both statements as to facts and statements as to values are used by judges to verify each other rhetorically.

The thesis adopts the theoretical proposition that there is *nothing outside of the realm of interpretation* inasmuch as there is no attempt made to bracket out certain types of discourse as improper for critical examination for lack of independent verification. By way of introduction to the shift in theoretical focus that takes place midway in the thesis towards deconstruction, it might be stated that there is an acceptance (at least in part) of the Derridean notion that “*there is nothing outside the text*”<sup>3</sup> in the sense that there is no interpretation that is not itself subject to further interpretation. The texts of factual description are key in interpreting the texts on matters of principle, and these in turn find meaning through interpretation of facts and so on. This is the idea that nothing is known which is not the product of some previous interpretation, and facts as well as values are read here as being verified not by objective outside referents but through interpretation. It is a central plank of the argument that this process has no logical finish point.

## *2. The Difficulties of a Liberal Perspective*

Accepting that discourse on matters of principle is possible, there remains the problem as to what (or whose) principles the thesis are concerned with. This is a question that calls for the determination of the criteria of criticism and justification in reading legal decisions. By what standard or measure can it be

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<sup>3</sup> See Chapter Six, *infra*, n.105, Derrida, *Of Grammatology*, Spivak, G.C. (trans.) (Baltimore: John Hopkins University Press, 1998) p.158



decided that a legal judgment is justified on principle? Liberal inheritors of Kant's critical metaphysics tend to take as a foundation a notion of the rights-bearing 'individual', and as a guiding principle the imperative that the liberty of the individual is not sacrificed to any other cause. This principled individualism is historically rooted largely in the desire to find a secular basis for morality in Eighteenth Century Europe, and finds opposition in a variety of communitarian and identity discourses. The question as to whether the principled content of legal judgments ought to be measured according to liberal or any other standard cannot be answered in the absence of some third perspective of judgment (and such a perspective is certainly not claimed here). I will not try ultimately to justify my own decision to focus upon liberal principles as opposed to other kinds of principles. However there are reasons why a focus upon liberalism may be interesting in a study such as this of law in the U.K. Liberal principles are codified in English statute law under the Human Rights Act 1998 and this provides a legal imperative for judges in deciding cases, even when the facts of the cases profoundly challenge liberalism's individualistic foundational assumptions. It is by examining the way that judicial rhetoric is deployed to meet this challenge that reveals the role of principle and its relationship with non-principled notions in law.

Of course this begs the question as to the precise relationship between Kantian liberalism and laws such as those enacted in the Human Rights Act. Although for many commentators the move from Kant's notion of the rational subject to a system of rights for individuals is a natural one, other traditions suggest that the relationship is more complicated. Even amongst those who forecast positive consequences for individual emancipation and self-realization

within western democracies,<sup>4</sup> there is a wide spectrum of opinion as to where, if at all, the legal principles codified in legal texts such as the Human Rights Act or European Convention on Human Rights derive ethical grounding. Costas Douzinas points out that despite the vast amount of rights literature and the apparent “triumph of Human Rights on the world stage”,<sup>5</sup> rights are not adequately theorised. The problem appears to be a nagging uncertainty as to whether, as was insisted by the Natural Law tradition, human rights are simply a given by virtue of ‘humanity’, or whether, as the Hegelian tradition stresses, their validity is historically grounded. Taking a different approach, Pragmatists such as Rorty celebrate a ‘groundless’ idea of liberalism and rights, arguing that they need no theoretical foundation except that it is the way ‘we’ in the west find most useful in talking about ourselves and the sort of world we find most appealing.<sup>6</sup> It is important to understand that this thesis is not a critique on the theoretical presuppositions of rights principles, and so there is no attempt made in this thesis to resolve this conflict of theorisations.

### *3. The Structure of the Thesis*

The argument of the thesis unfolds over the course of seven chapters. The chapters are arranged so as to develop my argument as to the inter-relation between liberal principle and non-principled (factual) consequentialism in legal

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<sup>4</sup> Contrast, for example, Habermas, J. *The Philosophical Discourses of Modernity* (Cambridge: Polity Press, 1990a) against Adorno, T. *Negative Dialectics*, Ashton, E.B. (trans.) (London: Routledge and Kegan Paul, 1973)

<sup>5</sup> Douzinas, C. *The End of Human Rights* (Oxford: Hart Publishing, 2000) p.1

<sup>6</sup> See Chapter Six, *infra*, s.3 on Rorty’s pragmatism



rhetoric, involving a certain shift of perspective after the Fourth chapter. Chapters One and Two introduce and develop a theoretical perspective on liberal moral and legal theory respectively and discusses how, from a ‘liberal’ viewpoint, matters of principle are derived. These chapters introduce some of the central themes and salient differences between liberal theorists in terms of conceptions of the ‘individual’, reason, universalism, procedure and substance. Also explored here are the difficulties faced by Rawls and Habermas in each theorising a modern liberalism that is both responsive to the pluralistic and multicultural conditions of modern western democracies, and also principled in the Kantian sense.

Chapter Three sets the ‘scene’ for the liberal viewpoint. It is here that the cases of the conjoined twins,<sup>7</sup> Myra Hindley<sup>8</sup> and Thompson and Venables<sup>9</sup> are introduced. The purpose is to draw attention to the particular type of problem that these cases pose for the liberal viewpoint. The account given here of the legal judgments suggests the point, developed later, that these cases are examples of dilemmas, insofar as they seem to demand a decision that the liberal perspective is not qualified to provide. The case of the conjoined twins confronts the judges with a situation involving two lives, only one of which is viable in the long term. How is the situation to be judged, given that the right to life deems that each life is sacred in itself? The cases of Myra Hindley and Thompson and Venables involve the length of rightful sentence. In *Hindley*,

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<sup>7</sup> *Re A (Conjoined Twins: Medical Treatment)* [2000] 4 All ER 961

<sup>8</sup> See *R v. Secretary of State For the Home Department, ex parte Hindley* [2000] QB 152; also *R v. Secretary of State For the Home Department, ex parte Hindley* [2000] 2 All ER 385 (HL)

<sup>9</sup> *R v. Secretary of State For the Home Department, ex parte Thompson* [1998] AC 407 (HL); See also *Re Thompson and Another (Tariff Recommendations)* [2001] 1 All ER 737

judges must decide whether life imprisonment may mean imprisonment for her whole natural life; *Thompson and Venables* requires a judgment as to the sentencing and release of child (ten year-old) murderers.

Chapter Four comprises the arena in which the role of liberal principle is examined in detail through an analysis of judicial rhetoric in the appeal cases. The chapter identifies the way in which the facts of the cases are constructed in judicial rhetoric in order to allow the application of liberal principle in drawing a moral distinction between the parties of a case, depending on how closely they are respectively held to approximate to liberal ideals. Chapter Five uses this analysis of the judicial decisions in order to introduce a deconstructive perspective on the rhetoric of legal judgement. In Chapter Four the symbiosis of principle and facts is shown to make a judgment possible by enabling the moral differences between otherwise equal parties to become visible. This process is shown to operate in rather different ways as between *Re A* and the ‘punishment’ cases, but in both instances there is a distinction made between those who are inside and those who are outside the scope of liberal principles and hence for making a decision at all. The key point here – and it is this that links the perspectives of chapters Four and Five – is this principled distinction is only made possible by a mixing of principled and non-principled ideas. Adopting the language of deconstruction, Chapter Five reads this as symptomatic of a larger process of unstable prioritisation and subordination or ‘self’ and ‘other’ within western thought, in which the apparently ‘natural’ hierarchies are actually infected with undecidability.

The shift towards a deconstructive perspective on judicial rhetoric leads us to three insights: that principled judgments are made by morally



distinguishing conflicting parties locked in a dilemma (such as *Re A*); that this distinction is only made possible by accessing the arguments of non-principled (factual) consequentialism; and that since the co-relatedness of principle and fact is constructed in rhetoric, the distinction is not in itself stable or ultimately justifiable. From a liberal perspective, to describe the consequent divide between Self and Other as ‘unethical’ is nonsensical since it represents only the ordinary and necessary process of categorisation and moral judgment. In shifting our perspective to deconstruction, it is possible to view these apparently natural hierarchies of inclusion and exclusion with regard to liberalism’s principles as open to challenge and reinterpretation.<sup>10</sup>

Chapters Six and Seven discusses some of the implications of the destabilisation of conceptual distinctions for political and ethical theory. Considered here is a range of the different ways in which the strategies of deconstruction have been read, interpreted and criticised in philosophical, literary and political debate. The focus here is upon potential that deconstructive perspectives have for critique in these areas. With regard to the possibilities of political critique, Chapter Six considers criticisms that have been aimed at deconstruction and also attempts to demonstrate its potential. Chapter Seven further develops the examination of the Self/Other divide, produced by legal rhetoric, in terms of its ethical implications. In an attempt to respond both to what deconstruction regards as an ethical problem and also to the criticisms levelled at deconstruction itself, this chapter suggests a positive, non-nihilistic,

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<sup>10</sup> The concept of the ‘Other’ appears with a capital ‘O’ in this context to distinguish it from the more common usage of the word ‘other’ in English, and ‘Self’ appears similarly capitalised so as to signify the binary relationship between the two concepts.

ethical critical role for rhetoric and metaphor in conceiving notions of justice in law. Beginning from a premise that the Self/Other difference identified in the legal judgments is a rhetorical construct, the chapter deploys rhetorical and metaphorical devices in a way that strives towards what deconstructive perspectives might regard as an ethical relation towards the other. Drawing on the scholarship of Derrida, Levinas, Rose, Goodrich and Cornell, the chapter presents a reading of two apparently unconnected literary sources – Ovid’s *Echo and Narcissus* and the traditional tale of *The Sly Fox and the Little Red Hen* – in order to ethically address the question of exclusion of the other. Also considered are conflicting interpretations of Sophocles’ tragedy of *Antigone*, and the chapter takes issue with Douzinas’ reading of the play in the light of Rose’s scholarship. An interpretation of these literary texts is presented to support the contention that, while there may be no escaping the structures of Self and Other identified in the legal judgments by the analysis of chapters three and four, these structures are not natural or fixed but offer opportunities for positive reconstruction and reinvention.



## Chapter 1

### The Liberal Universal Viewpoint

#### 1. Introduction

The theoretical positions attracting the label of ‘liberalism’ inform some of the most important of today’s global issues. Both liberal rights and global capitalist discourses transcend national borders and affect local traditions and cultures in increasingly profound ways. In opposition to moral empiricists, sceptics and relativists, liberals sustain a basic premise that, with regard to normative questions of morality and law, rational objectivity is possible, and have spent much effort in trying to show how this is so. For liberals, objectively rational norms – which might form a set of moral or legal rules – are ‘valid’ insofar as they are derived in a universally applicable way and ‘just’ insofar as they appeal to a universal sense of justice. Starting with this belief, liberal theory constructs its own objective foundations from which to make its judgments, using *a priori* (essential, universal, prior to experience) principles which provide the footing for a universal viewpoint. Since this viewpoint is constructed from universal principles, the judgments it makes are (for liberals) themselves universal. For reasons that one might call ‘political’ or perhaps ‘moral’,<sup>1</sup> these foundational principles are not open to empirical doubt. These foundational principles relate to fundamental liberal beliefs

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<sup>1</sup> We shall attend more closely to the uses of these words throughout the thesis.

in the nature of humanity and its moral status and capabilities. These are not questions of human science, but rather a normative scheme.<sup>2</sup> To seek empirical grounds for a universal point of view would contradict the liberal definition of justice as right in itself, since knowledge about the empirical world cannot be secured in advance. Judgments cannot be justified purely on what seems to work best, or what is currently considered most beneficial, since these are given to constant change. It is necessary for liberal theorists to assume that the basis for normativity is secure in the face of change.

In sustaining that this objective viewpoint is a possibility, the modern liberal projects discussed here set themselves apart from anti-foundational theory, proponents of which regard any principles given *a priori* as mere metaphysical posturing. But despite openly setting up initial foundations for their theories, Rawls and Habermas fiercely reject metaphysics as such and describe their own approach as *Post*-metaphysical. This chapter will examine just what these foundational principles are and in what sense they justify making such an apparently ambitious claim to a *Post*-metaphysical universal point of view. Through explication of the major themes of the liberal point of view it will highlight some of the links and relationships between classical and modern forms and how this view informs a conception of liberal democracy.

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<sup>2</sup> Rawls, J. *Political Liberalism* (New York, N.Y.: Colombia University Press, 1996) p. 87. See also Plant, R. *Modern Political Thought* (Oxford and Cambridge, Mass.: Blackwell, 1995) p. 23



## 2. Liberalisms, Morality and Impartiality

What follows here is a very sparse outline of the formulations of the universal viewpoint constructed by certain classical and modern liberals. The overarching theme of this section is to identify the peculiarly liberal approach of equating justifiability with impartiality. A recurrent problematic is the notion of morality. As this section shows, morality functions in different ways for different formulations of liberal impartiality. In Kant and Hegel we find morality very much an integral part of their theses. As such the liberal viewpoint discussed might also be called the moral viewpoint. For Kant, at least, the two are the same. However, morality becomes more problematic for the modern liberals who are anxious to respond to criticisms of moral sceptics and relativists.

### 2.1 *Introduction to Kant – The Categorical Imperative*

For Kant, the moral law is given by practical reason and is expressed in three formulations of the ‘categorical imperative’<sup>3</sup> in his *Groundwork of the Metaphysics of Morals*. Firstly, “I ought never to act except in such a way that I can also will that my maxim should become a universal law”.<sup>4</sup> And later: “Act only on that maxim through which you can at the same time will that it should become a

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<sup>3</sup> Kant, I. *Groundwork of the Metaphysics of Morals* (London: Routledge, 1995) p.88

<sup>4</sup> *Ibid.*, p.67

universal law”.<sup>5</sup> What commands the person is the undeniable claim that the moral law makes upon the person’s rational will. In other words, we cannot act contrary to the categorical imperative without knowing that we thereby act against morality and thus against our rational will. The position of Reason (as *practical* reason) in Kant’s theory is crucial because it provides the key characteristic of morality itself: The moral viewpoint is rational because it is universal, and hence moral commands are objective. So, for Kant, ‘reason’, ‘moral’, ‘universal’ and ‘objective’ are mutually dependant and defining concepts. Reason also provides the key to Kant’s conception of the morally virtuous person: A person is morally praiseworthy if he acts according to the universal moral law. Mere kindness or benevolence as reasons for acting are not ‘moral’ in the Kantian sense because they are not necessarily oriented towards universal observance. Hence reason is associated with the universal law and unreason with anything outside it. In order to take a moral position one must take the moral law as one’s guide and not one’s subjective (and therefore possibly fleeting) sentiments.

In the *Groundwork*, the *Critique of Practical Reason* and the *Metaphysics of Morals* Kant attempts to provide an explanation for the relationship between practical reason, the moral law, the will, and freedom. In the *Metaphysics*, Kant begins by making practical reason itself synonymous with the will.<sup>6</sup> The will in turn determines what choices we make. When our will is obliged to act rationally (i.e. according to the universal practical law) by the categorical imperative then it is a

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<sup>5</sup> *Ibid.*, p.84

<sup>6</sup> Kant, I. *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991) p. 42



‘pure’ will (and also a ‘free’ will) and its bearer is himself deemed to be free.<sup>7</sup> It is in the pure will that the objective moral law finds its ground.<sup>8</sup> In the *Critique* however, the categorical imperative is itself held to be entirely unconditional, i.e. given *a priori*. In fact, Kant describes it as “originally legislative”<sup>9</sup> and the free will finds its motivation in it. Which, then, is prior - the free will or the moral law? Both, it seems, as elsewhere in the *Critique* Kant states: “freedom and an unconditional practical law reciprocally imply one another.”<sup>10</sup> It appears, then, that at the base of Kant’s moral theory lies a circular foundation of free will (man’s moral sense) and practical reason (the moral law). Both are, in different places, described as conceived entirely *a priori* and at the same time co-dependent. When a person wants to know what he ought to do, Kant insists that he will intuitively know “because he is conscious that he ought, and he recognises that he is free”.<sup>11</sup> What he is conscious of, presumably, is the moral law itself which must be accepted, as Kant says, as a “fact”: It cannot be shown exactly empirically or deduced theoretically but makes itself known *a priori*; It proves the faculty of freedom through expressing the autonomy of practical reason (i.e. independence from objects of desire).<sup>12</sup> It is our moral sense – our free will – which is itself

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<sup>7</sup> *Ibid.*, p.48

<sup>8</sup> *Ibid.* Also p.52

<sup>9</sup> Kant, I. *Critique of Practical Reason*, Abbot, T.K. (trans.) (Amherst, N.Y.: Prometheus Books, 1996) p.47

<sup>10</sup> *Ibid.*, p.44

<sup>11</sup> *Ibid.*, p. 46

<sup>12</sup> *Ibid.*, p. 49, p. 64

practical reason, that makes it possible to know the moral law (based in the a priori principles of practical reason) and it is the moral law that gives us knowledge of what we ought to do and of our freedom. If we are to accept this conception of reason it seems as though one must be content to accept that reason is a metaphysical entity: it is simply ‘there’ and is not to be questioned further. Being ‘there’ makes the moral law meaningful as the proper guide for our actions.

Kant’s conception of the person (and the essential characteristics of reason and intuitive moral sense that persons are assumed to have) is introduced in the third formulation of the moral law. The ability to rationally formulate one’s own ends is the mark of humanity for Kant,<sup>13</sup> and leads to the imperative to “use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means”.<sup>14</sup> Persons are thus accorded respect as rational, autonomous agents. Acting in accordance with the universal moral law is rational because it is a way to express respect for another rational person. Having such autonomy and rationality, each person has dignity that “cannot be brought into reckoning or comparison without ... profanation of its sanctity”.<sup>15</sup> This point shall be returned to in the next chapter in the context of what it means to treat a person as an ‘end in itself’.

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<sup>13</sup> Kant, *supra*, n.6, p. 392. See also Caygill, H. *A Kant Dictionary* (Oxford and Cambridge, Mass.: Blackwell Reference, 1995) p.230

<sup>14</sup> Kant (1998) *Groundwork of the Metaphysics of Morals*, Gregor, M. (ed.) Korsgaard, C.M. (Introduction) (Cambridge: Cambridge University Press) p.38 (s.4:429)

<sup>15</sup> Kant (1995) *supra*, n.3, p.97



Kant's categorical imperative relates both to inner virtue and external behaviour. It is the latter which, for Kant, establishes the primacy of the basic liberal right of freedom in the negative sense that each person's 'freedom' must not interfere with that of anyone else. The only "innate"<sup>16</sup> right is 'freedom', the source of which is reason itself (the autonomous will - which is assumed to be given *a priori*) and innate freedom is qualified only by innate equality. This constitutes Kant's Principle of Right. As a reformulation of the categorical imperative, Right is "the sum of conditions under which the choice of one can be united with the choice of another with a universal law of freedom".<sup>17</sup> Kant describes all other rights in a society as flowing from this natural right of freedom: right to property<sup>18</sup> and self-defence<sup>19</sup> are all considered necessary derivatives from it. In the Principle of Right then, we begin to see the emergence of a Kantian legal theory, to which this chapter shall return.

## 2.2 Introduction to Hegel – Morality as a part of Absolute Spirit

Hegel's liberalism tends to be regarded as distinct from Kant's because of the greater emphasis that Hegel places upon the individual's interaction with other people and participation in the State in realising one's freedom. Hegel's *Philosophy of Right* develops this notion in the context of participation in the public life of

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<sup>16</sup> Kant, I (1991) *supra*, n.6, p.63

<sup>17</sup> *Ibid.*, p.56

<sup>18</sup> *Ibid.*, p. 68-70

<sup>19</sup> *Ibid.*, p. 57

ethics, morality and civil society.<sup>20</sup> In *Phenomenology of Spirit*, Hegel traces the intersubjective struggle for mutual recognition of one's individuality through one's work.<sup>21</sup> Hegel's view of freedom is therefore very much bound up with being a participant in the world and a member of a state. Employing his dialectical philosophical method, Hegel constructs a theorisation of the rational harmonisation between individual and state in which the proper roles and duties of each are determined. As a political theorist, the close proximity of individual and rational state has meant that Hegel has been read as providing a grounding both for participatory democracy and also for totalitarian government.<sup>22</sup> Hegelian dialectics is a process in which 'new' concepts are derived from a systematic combination of conceptual binary oppositions. The process begins by comparing very basic intuitive concepts in binary opposition such as the concepts of Being and Nothingness. A new concept ('actual' being) is produced when one realises that neither of these concepts is wholly and completely opposite to the other. For instance, abstract Being is marked by nothingness since it is empty of actual substance, and Nothingness implies the presence of 'something' for there to be a concept to speak about at all. Hence 'actual being' is an implied third thing that

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<sup>20</sup> *Ibid.*

<sup>21</sup> Ilting, K. –H. 'The Dialectics of Civil Society' in Z. A. Pelczynski (ed.) *The State and Civil Society: Studies in Hegel's Political Philosophy* (Cambridge: Cambridge University Press, 1984) pp. 211-226

<sup>22</sup> See Taylor, C. 'Hegel's Ambiguous Legacy for Modern Liberalism' in *Cardozo Law Review* (1989) 10 pp. 857 – 870



would supplement both concepts.<sup>23</sup> In the political philosophy of *Philosophy of Right*, the universal idea of the person who has an ‘Abstract Right’ to do as his freewill determines is at first found to be an unacceptably empty expression of human freedom. The dialectical method leads Hegel to gradually flesh out the concept with ethical and moral content, ending ultimately with the fully free individual as a participant in the public life of the rational state.

Like Kant, Hegel associates morality with reason and universality, and immorality with unreason and mere particularity, but unlike Kant, Hegel’s universalism finds an active role for the world of particular ends in defining the requirements of moral duty, and the just state. Morality, it must be remembered, is part of the substantive flesh that Hegel applies to the dry bones of individualistic Abstract Right. In his *Philosophy of Right* Hegel characterises morality as a unification, or harmonisation between the pursuing of one’s own subjective purposes and the possibility of all others doing the same. Pursuing one’s own purposes is a right in an abstract sense, given by a person having a free will, but this Abstract Right can only be rational once we consider all others affected by the exercise of it. Subjective purposes that can be thus shown to also have “universal value”<sup>24</sup> may be regarded as rational and moral. Immorality – a wrong – is a purpose whose particularity cannot be reconciled with the universal. In Hegelian

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<sup>23</sup> Hegel, G.W.F. *The Hegel Reader*, Stephen Houlgate (ed) (Oxford: Blackwell, 1998) p. 129 and pp.170-199, e.g. p. 190: “The commonest injustice done to a speculative content is to make it one-sided, to give prominence only to one of the propositions into which it can be resolved.”

<sup>24</sup> Hegel, G.W.F. *Elements of the Philosophy of Right*, Wood, A.W. (ed.) (Cambridge: Cambridge University Press, 2000) p.141/s.113

morality, therefore, an individual's subjectivity is preserved in unity with other people's wills, allowing for a connection between the particular and the universal to be maintained. If my own particular purposes are not in disharmony with those of others, then they can be included within Hegel's wider conception of reason, and are thus simultaneously universal and universally subjective.<sup>25</sup> The motivation towards marriage of the particular and universal leads Hegel towards the moral prescription: "I ought to be aware, not only of my individual action, but also of the universal which is associated with it."<sup>26</sup> However, Hegel is critical of Kant's belief that moral duty can be fully accounted for in such formulations alone. As we have seen, Kant's idea of moral duty is given by the categorical imperative itself, but Hegel regards this device as too abstract to provide sufficient indication as to what moral duty is without having to perform the extra task of adding moral substance. Kant uses his categorical imperative to show that certain actions must be wrong, since they would contradict the idea of universal observance.<sup>27</sup> Hegel criticises this move by pointing out that such a contradiction can only be assumed after one has presupposed substantive conditions of the world. For example, for theft to be judged as 'wrong' according to the categorical imperative, we have to first presuppose the conditions of property and ownership. For Kant, these conditions flow naturally from the idea of a person's 'innate' freedom, making such presuppositions possible without sacrificing the impartiality of the moral structure.

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<sup>25</sup> *Ibid.*, p.139/s.111

<sup>26</sup> *Ibid.*, p.146/s.118

<sup>27</sup> See Kant (1995) *supra*, n.3, pp. 85-6. Kant uses the categorical imperative to show that lying, selfishness, idleness and suicide are universally wrong.



However, for Hegel, if the idea is to act purely from duty then surely such presuppositions defeat the object of the imperative.<sup>28</sup>

### 2.3 Introduction to Rawls – Political Liberalism and Justice as Fairness

Rawls's attempts to determine principles of justice which might be acceptable to all reasonable people<sup>29</sup> is Kantian at least in spirit. Although in later writings (notably *Political Liberalism*) he has critically addressed the problematic nature of the 'universalist' assumptions of his earlier work (i.e. the *Theory of Justice*), Rawls's dream of providing the groundwork for an inclusive framework for conceptions of justice has not changed. However, Rawls is keen to distance himself from much of Kant's metaphysics of Reason, morality, and the pure will. For instance, Rawls gives to 'morality' a far humbler role than does Kant or Hegel. Rather than being synonymous with universality (as it is in Kant), morality is a merely personal affair for citizens, not really important in the search for a public, universal framework for justice. His technique (which he calls 'Kantian Constructivism') is to try to derive principles of justice from the premise that, notwithstanding the normative diversity

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<sup>28</sup> *Ibid.*, p.162-3/s.135

<sup>29</sup> Reasonable people as distinguished from "fundamentalists" are those who, although having different 'comprehensive doctrines' (religious or moral beliefs about life and its meaning) are willing to also affirm a reasonable – i.e. generally acceptable – conception of justice. See Rawls, J. *The Law of Peoples: with 'The Idea of Public Reason Revisited'* (Cambridge, Mass.: Harvard University Press, 1999a) pp.126-7



of modern society, there exists a narrow piece of shared self-identity.<sup>30</sup> In society marked by ‘reasonable pluralism’, this shared self-identity forms Rawls’s ‘political’ conception of the person as free and equal. This conception is fundamental to Rawls’s liberalism since, unlike any of the citizens’ personal prejudices (or ‘comprehensive doctrines’), it is universally shared by reasonable people.<sup>31</sup> Principles of justice thus based are described as “freestanding”<sup>32</sup> and “political” as opposed to moral or metaphysical.<sup>33</sup> A ‘reflective equilibrium’ is achieved when citizens see that these are compatible with their own personal moral judgments.<sup>34</sup> This situation of stability Rawls regards as a good enough reason not to seek any further justification for conceptions of justice in the real world.<sup>35</sup>

In order to derive the essential principles of justice, these factors are linked together in a theoretical device that Rawls calls the ‘original position’. Rawls invites us to imagine that this original position is inhabited by parties that are cut

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<sup>30</sup> Rawls, J. ‘Kantian Constructivism in Moral Theory’ (1980) 77 *Journal of Philosophy*, pp. 515 – 572, p. 519

<sup>31</sup> Rawls (1996) *supra*, n.2, p. 12; Rawls regards Kant’s metaphysics of the person as such a comprehensive doctrine, since it cannot be assumed that all reasonable people will accept Kant’s metaphysical ideas about Reason.

<sup>32</sup> *Ibid.*, p.10, p. 374

<sup>33</sup> *Ibid.*, p. 374

<sup>34</sup> Rawls (1996) *supra*, n.2 at p.391-2. See also Rawls, *A Theory of Justice* (Oxford: Oxford University Press: 1999) p.18 A move that some regard as indicative of Rawls finding his justification in morality rather than rationality, see Gunnarsson, L. *Making Moral Sense: Beyond Habermas and Gauthier* (Cambridge University Press, 2000) p. 8

<sup>35</sup> Rawls *Political Liberalism* (1996) *supra* n.2 at p.28, 51-3

off from contingent facts of the world by a ‘veil of ignorance’,<sup>36</sup> which ensures that, although aware of general ideas about politics and economics, they know nothing of the class, social status, fortune, abilities or desires of the people they represent<sup>37</sup>. They must choose the first principles of justice equipped only with the knowledge that people in the real-world all want a share of life’s essentials – the ‘primary goods’<sup>38</sup>: basic liberties, freedom of movement, powers of office, wealth and self-respect.<sup>39</sup> Since the veil of ignorance prevents them from knowing or deciding who gets what, they will ensure that these goods are distributed equally without favour. In this way, Rawls ensures that the parties of the original position will act to advance their own interests while remaining fair<sup>40</sup>. Hence Rawls describes this process as “justice as fairness”<sup>41</sup>. Liberty is the most important ‘good’, which means that the first concern of the parties behind the veil of ignorance will be to distribute it in the most equally advantageous way possible. Interpreted as liberties, rights are primary goods to be distributed fairly amongst the citizens<sup>42</sup>. Interpreting

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<sup>36</sup> Rawls (1999) *supra*, n.34, p. 222

<sup>37</sup> *Ibid.*, p. 11

<sup>38</sup> *Ibid.*, p. 54-5

<sup>39</sup> Rawls, *Political Liberalism* (1996) *supra*, n.2, p. 308. But see Walzer, who argues, *contra*, that because ‘goods’ do not have the same value in all societies, there cannot be one universal index of primary goods: Walzer, M. *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford, Blackwell, 1983) p.8

<sup>40</sup> Rawls (1980) *supra*, n.30 at p.524

<sup>41</sup> Rawls (1999) *supra* n.34 at p.11

<sup>42</sup> Rawls assigns the “freedom from psychological oppression and physical assault and dismemberment (integrity of the person)” as liberties in Rawls (1999) *supra* n.34, at p.53



the effect of this set up requires that one appreciates the difference in emphasis that Rawls gives to the role of Kantian Constructivism in his earlier as compared to his later writings. The Rawls of the *Theory*<sup>43</sup> regards that the process shows that in such conditions there are two principles that would always be chosen in deciding upon a just constitution. These principles are that everyone “has an equal right to the most extensive scheme of basic liberties” and that any inequalities are “to everyone’s advantage” and “attached to positions and offices open to all.”<sup>44</sup> It is possible to regard Rawls’s first principle of justice and Kant’s theory of Right as “virtually identical”.<sup>45</sup> Just as Kant’s ‘Right’ gives rise to a right to self defence, (so Guyer suggests) Rawls’s first principle of justice ensures that the rational agents in the original position would agree upon a system of justified coercion to ensure that hindrances to freedom could be removed.<sup>46</sup> After parties choose the principles of justice the veil is removed and they find themselves in a society (all with their own position in society, life plans, ends, desires etc) governed by those principles. All parties in the original position are motivated by the possibility that s/he might turn out to be in the society’s worst position and will ensure that it is acceptable. Following this procedure, subsequent principles will satisfy this basic indicator of

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<sup>43</sup> In contrast to his later reworking in *Political Liberalism*.

<sup>44</sup> Rawls (1999) *supra* n. 34, p. 53

<sup>45</sup> Guyer, P. *Kant on Freedom, Law and Happiness* (Cambridge: Cambridge University Press, 2000) p.277

<sup>46</sup> *Ibid.*, p.276



fairness, “whatever they happen to be”.<sup>47</sup> However, the original position is properly understood as a representational device rather than a blueprint for constitution-making. Characterised in *Political Liberalism* as a “framework of thought”,<sup>48</sup> the original position allows citizens in the real-world to adopt a standpoint that is impartial, “hypothetical and non-historical” representing persons as free and equal and reciprocally regarding all others as such.<sup>49</sup>

#### 2.4 Introduction to Habermas – The Intersubjective Moral Viewpoint

Habermas’s discourse theory is a response to what he sees as a crisis facing legitimating foundations of modernism in the contemporary climate of moral fracture and relativism. Habermas’s approach is significantly different to Rawls insofar as he does not seek to detach morality from the universal viewpoint. Presenting an argument for the conditions for universal normativity, Habermas attempts to meet the moral sceptic on his own terms in order to convince that moral and legal principles can be justified, not merely by adopting culturally specific sensibilities, but rationally.<sup>50</sup> Therefore, like Rawls, Habermas can in a sense be

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<sup>47</sup> Williams, M. ‘Justice Toward Groups: Political, Not Juridical’ *Political Theory* (1995) 23 (1) pp.67-91, p.70

<sup>48</sup> Rawls (1996) *supra*, n.2, p.397

<sup>49</sup> *Ibid*, p.23

<sup>50</sup> Gunnarsson (2000) *supra*, n.34 , p.101

regarded as taking up the Kantian mantle. Habermas takes a “work-in-progress”<sup>51</sup> approach to justice, in that he makes it clear that his theoretical apparatus are intended to construct the *conditions* for citizens to construct their own substantive moral and legal principles in discourse.<sup>52</sup> Instead of Rawls’s contracting rational agents (or Dworkin’s Herculean judge of ‘integrity’<sup>53</sup>), Habermas attempts to find a universal viewpoint through an identification of the essential characteristics of democratic processes.

Habermas’s approach is Kantian in the sense that moral norms are categorical imperatives, but he rejects Kant’s practical reason in favour of an *intersubjective* rationality. This he (with reservations) attributes to Hegel,<sup>54</sup> and for

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<sup>51</sup> McCormick, J.P. ‘Habermas’s Discourse Theory of Law: Bridging Anglo-American and Continental Legal Traditions?’ *MLR* (1997) 60 (5) pp. 734 - 743, p. 740

<sup>52</sup> Habermas, J. *Moral Consciousness and Communicative Action* (Cambridge: Polity Press, 1990) pp. 66 - 8, p. 122. In this way, Habermas differs significantly from Rawls, whose theoretical construct of the original position gives rise to certain principles. On this point, see Gunnarsson, (2000) *supra*, n. 34, p. 91

<sup>53</sup> See Dworkin, R. *Law’s Empire* (Cambridge, Mass. and London: Harvard University Press:, 1986) p.239 and see generally Chapter Seven, *infra*.

<sup>54</sup> In Habermas, J. *Justification and Application* (Cambridge: Polity Press, 1993), Habermas explains (p. 1) that his discourse theory “takes its orientation for an intersubjective interpretation of the categorical imperative from Hegel’s theory of recognition but without incurring the cost of historical dissolution of morality in ethical life.”. In *The Philosophical Discourses of Modernity* (Polity Press, 1990a) p.40, Habermas marks his divergence from Hegel at the point at which Hegel’s early recognition of intersubjectivity is replaced with an *absolutist* rationality. See this chapter, s. 3.1.4 for further discussion of Habermas on the separation of ‘ethical life’ from ‘morality’; see s. 4.1 for discussion of Hegel’s theory of inter-subjective recognition.



Habermas it consists of rational argumentation and agreement between people. His project begins by separating strategic and communicative forms of discourse – the latter apparently being directed towards rational agreement.<sup>55</sup> Habermas identifies the conditions of ‘communicative action’, by which all people can address their subjective claims to a universal audience. Whereas Kant held that the just principle is that which one could *will* everyone to act upon, and Rawls held that it is one which everyone in isolation and ignorance could choose, Habermas constructs a ‘dialogical’ point of view of universal assent.<sup>56</sup> He reformulates Kant’s categorical imperative thus: “I must submit my maxim to all others for purposes of discursively testing its claim to universalisability”.<sup>57</sup> Just principles are those that “can count on universal assent, because they perceptibly embody an interest common to all affected”.<sup>58</sup> So for the validation of any given principle, the only point of reference is the possibility of agreement through discourse between all persons affected by it, in which everyone’s “needs and wants are interpreted in the light of cultural values”.<sup>59</sup> This requirement is described as the ‘principle of universalisation’.<sup>60</sup>

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<sup>55</sup> Habermas, J. *The Theory of Communicative Action Vol. 1*, McCarthy, T. (trans.) (Boston: Beacon Press, 1984) pp. 86-8

<sup>56</sup> Habermas, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law* (Cambridge: Polity Press, 1996) p.156-7, 181-2; also Habermas, ‘On the Pragmatic, the Ethical and the Moral Employments of Practical Reason’ in Habermas (1993) *supra*, n.54, pp. 1-17 at pp. 7-8.

<sup>57</sup> Habermas (1990) *supra*, n.52 at p.67

<sup>58</sup> Habermas, J. *A Reader*, (Oxford: Polity Press, 1996a) p.183

<sup>59</sup> Habermas (1990) *supra*, n.52, p.68



Habermas's discourse theory depends upon accepting his claim that, irrespective of a particular context or intent, engaging in communicative action entails accepting certain presuppositions. These presuppositions are twofold. Rational communication itself presupposes equality between participants, freedom to raise any claims, non-coercion, and openness to all interested persons to participate.<sup>61</sup> Further to this, the parties who enter the argument themselves make four validity claims when they speak. These claims consist of comprehensibility (an agreed meaning of the particular phrases and words used), truth (factual truth/falsity of what is said), rightness (reasons entitling someone to make a certain statement) and sincerity (everyone must mean what they say).<sup>62</sup> A possible ambiguity is whether or not these presuppositions are unavoidable if one wishes to engage in any communicative discourse at all, or whether they are idealisations that must be institutionalised in order to secure the conditions for *rational* discourse.<sup>63</sup> Certainly Habermas is clear that, in some sense, the presuppositions are an unavoidable point of reference for anyone who engages in discourse. For instance, Habermas states

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<sup>60</sup> Habermas, *The Theory of Communicative Action Vol. II*, McCarthy, T. (trans.) (Boston: Beacon Press, 1987) pp.92-6. See also Habermas (1996) *supra*, n.56, p.108-110, 230. For Raes, Habermas's attempt to define the universal presuppositions for rational agreement represents a modern form of Hegel's Absolute Spirit, since it reads a single *telos* into language. See Raes, K. 'Legislation, Communication and Strategy: A Critique of Habermas's Approach to Law' *J of L & Soc* (1986) 13 (2) 183-206, p. 190

<sup>61</sup> Habermas (1990) *supra*, n.52, p. 89

<sup>62</sup> *Ibid.*, pp. 87-89; See also Outhwaite, W. *Habermas: A Critical Introduction* (Cambridge: Polity Press, 1994) p.40

<sup>63</sup> See Gunnarsson (2000) *supra*, n.34, p.87

that, although participants of discourse may argue from their very different communities and cultural viewpoints, nevertheless universal rules underlie their orientation towards agreement. For Habermas, “concepts like truth, rationality or justification play the *same* grammatical role in every linguistic community.”<sup>64</sup> The justification for this bold assertion is that, apparently, “[t]he supposition of a common objective world is built into the pragmatics of *every single linguistic usage*.”<sup>65</sup> Habermas adopts and adapts concepts borrowed from, among others, Wittgenstein; chiefly the notion that forms of discourse are “language games”<sup>66</sup> which, like other games, have their own rules that the participants necessarily accept upon joining. Elsewhere Habermas employs Cartesian logic to show that it is a logical contradiction to reject his argument. Just as, for Descartes, it would be a logical contradiction to state “I do not exist”, since by saying so one is already presupposing the existence of an “I” who denies his own existence, so Habermas states that even to make a refutation of universalisability is to enter into the discourse of argumentation and to therefore implicitly accept the universal rules of argumentation.<sup>67</sup> However, he also describes the presuppositions as “unavoidable idealisations”<sup>68</sup> for an *ideal* speech situation.<sup>69</sup> Adopting such a description gives

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<sup>64</sup> Habermas, J. *Post-metaphysical Thinking: Philosophical Essays*, Hohengarten, M. (trans.) (Oxford: Polity Press, 1992) p.138, Original Emphasis

<sup>65</sup> *Ibid.*, Emphasis added

<sup>66</sup> Wittgenstein, I. *Philosophical Investigations* (Oxford: Blackwell, 1973)

<sup>67</sup> Habermas (1990) *supra*, n.52, p.86

<sup>68</sup> Habermas (1996) *supra*, n.56, p.5



credence to the interpretation that rather than simply describing the factual conditions of *all* communication, they are the conditions for achieving *rational* discourse.<sup>70</sup> Habermas maintains that, while the ideal presuppositions of communication may sometimes be counterfactual, they are nevertheless essential for universal agreement.<sup>71</sup> If they are idealisations, does Habermas actually find the presuppositions or does he instead construct them?<sup>72</sup> As Habermas himself explicitly states, the formal conditions of the ideal speech situation are not in themselves moral norms. Rather, they are the necessary conditions for the production of moral norms by real-world participants of discourse.<sup>73</sup> This being so, on what basis can Habermas confidently derive the principle of universalism itself? The answer that Habermas gives is that we *just know* that, if norms are not derived in conditions of fairness, equality, openness and non-coercion, then they cannot be sincerely described as commanding universal assent.<sup>74</sup> Rather than being regulative,

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<sup>69</sup> Habermas (1990) *supra* n.52, p.88. See also Habermas, J. 'Wahrheitstheorien' (Theories of Truth) in Fahrenbach, H. (ed.) *Wirklichkeit und Reflexion, Festschrift für W. Schulz* (Pfullingen, 1973) pp. 211-265 at 211; cited in Bernstein, J.M. *Recovering Ethical Life: Jurgen Habermas and the Future of Critical Theory* (London and New York, N.Y.: Routledge, 1995) pp.52-3

<sup>70</sup> Rehg, W. *Insight and Solidarity: The Discourse Ethics of Jurgen Habermas* (Berkeley: University of California Press, 1994) p.65

<sup>71</sup> Habermas (1993) *supra*, n.54, p.56

<sup>72</sup> Herbert, J. *Contemporary German Legal Philosophy* (Philadelphia: University of Pennsylvania Press, 1996) p.55

<sup>73</sup> Habermas (1990) *supra*, n.52, p.93-4

<sup>74</sup> Habermas (1996) *supra*, n.56, p.19



they are essential for rational democratic argument,<sup>75</sup> ensuring that agreement is achieved only through argument (and not, say, force or deception).<sup>76</sup> In other words, either we accept his communicative presuppositions or else we abandon hope for democratic discussion. As a Post-metaphysical liberal, Habermas is conscious of the fact that, unlike Kant, he is constrained from relying upon any philosophical metaphysics as an underlying foundation.

For certain commentators, Habermas's view that all communication, even of a hostile or aggressive variety, requires an assumption of receptive abilities in the intended addressee shows discourse ethics to have a "subversive and emancipatory potential".<sup>77</sup> It has been argued by some that Habermas's insistence that the presuppositions of communicative action are universal enables radical critique, for even the most oppressive or dismissive voice will find itself inadvertently affirming the rules of fair participation.<sup>78</sup> On the other hand, the suggestion that the rules that Habermas finds in communication represent the *only* standard of rationality strike others as itself oppressive. Raes warns that the ambitions of dominating powers

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<sup>75</sup> Habermas, J (1993) *supra*, n.54, p.31

<sup>76</sup> Habermas (1984) *supra*, n.55, p. 24-5. If Habermas is concerned only with *rational* speech then this separation of language games means Raes's view that Habermas, like Hegel, unifies all forms of reason and rationality within one Absolute Idea or 'Spirit' is unsustainable. However, this interpretation sits uncomfortably with the view that the rational presuppositions are unavoidable in *all* forms of communication.

<sup>77</sup> McCormick, J.P. 'Habermas's Discourse Theory of Law: Bridging Anglo-American and Continental Legal Traditions?' *MLR* (1997) 60 (5) pp. 734-43 at p. 739

<sup>78</sup> *Ibid.*, p. 739

may also be realised through the discourse of legitimate language.<sup>79</sup> Others have suggested that Habermas's universalism should be regarded in the context of his own interest in German and US constitutional law.<sup>80</sup> For her part, Iris Young argues that a system that considers only speech that is 'rational' according to a modern Enlightenment conception of serious argument cannot be described as 'universal', but rather represents only a particular western form of rationality which, although including some, excludes other voices.<sup>81</sup> Even as an ideal, the value of the 'Ideal Speech Situation' is questionable. Some critics have argued that Habermas is unrealistic and too optimistic that the forces of oppression and manipulation can be exposed and resisted<sup>82</sup> or that the obstacles to universal communication can be overcome<sup>83</sup> by this idealisation. Thus, a question remains as to whether the presuppositions that Habermas identifies serve as a radical or a conservative measure of law's legitimacy.<sup>84</sup>

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<sup>79</sup> Raes (1986) *supra*, n.60, p.192

<sup>80</sup> Harvey, C. J. 'The Procedural Paradigm of Law and Democracy: Review of Jurgen Habermas's *Between Facts and Norms*' *Public Law* (1997) pp. 692-703 at p. 702

<sup>81</sup> Young, I. M. 'Justice and Communicative Democracy' in Gottlieb (ed.), *Radical Philosophy: Tradition, Counter-Tradition, Politics* (Temple University Press, 1993) p.129-31

<sup>82</sup> Raes (1986) *supra*, n.60

<sup>83</sup> Black, J. 'Proceduralizing Regulation: Part II' *OJLS* (2001) 21 (1) pp.33-58 at p. 41

<sup>84</sup> Salter, M. 'Habermas's New Contribution to Legal Scholarship' *J of L & S* (1997) 24 (2) pp. 285-305, p. 302. Some critics have suggested that a more radical perspective would be less idealistic and pay greater attention to, for example, manipulative or strategic uses of language (Raes, (1986) *supra*, n.60, pp. 188-9) and specific ways of combating actual inequalities and strategies of political dominance (See Black (2001) *supra*, n.83, p. 46).



### 3. The Viewpoint as Universal and Deontological

For any principle to be regarded as universal, it must be shown that its value does not depend upon any particular consequence or context. Liberal universalism can only make sense if one is ready to believe that the unknown ‘other’ can and should be incorporated into a moral order through identifying essential shared characteristics. As Rawls contends,<sup>85</sup> so long as a person is not fundamentally unreasonable, no differences in local tradition, religion, language, culture or politics should prevent this union of human beings. In such conditions of reasonable pluralism, each person is essentially ‘just like me’ and can therefore be included within a universal community. The techniques by which this universal community is theorised are the subject of this section. In general terms, liberals seek to distinguish all that is permanent and fixed from all that is transient and subject to change. For liberals, the former comprises that which can be assumed to be shared by all people, and the latter is all that cannot. It is worth noting that this endeavour is not a purely liberal one. The attempt to isolate that which is certain from that which is not has been a central preoccupation for western philosophers since Plato’s separation of the “Two Orders of Reality”.<sup>86</sup> The defining feature of the liberal

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<sup>85</sup> See s.2.3, *supra*, on Rawls’s notion of ‘reasonable pluralism’.

<sup>86</sup> Plato, “Part VII: The Philosopher Ruler”, in *The Republic*, Lee, D. (trans.) (London and New York, N.Y.: Penguin) esp. pp.206 – 216, comprising the realm of unchanging ‘form’ – the proper object for philosophical reflection – and that of transitory and unreliable ‘sense’.



involvement in this philosophical endeavour is its focus upon normative rather than epistemic certainty.

As critics such as Fitzpatrick have noted, the idea of universalism is a profoundly political one. The very notion that there is a realm of universal values to be contrasted with merely particular ones implies a world order in which the ‘civilised’ are separated from the ‘savage’ on the basis of moral and legal changes (e.g. the French and American Revolutions) in the nations of the former.<sup>87</sup> If one regards liberalism as a product of particular historical developments, then its claim to universality suggests an attempt to export culturally dependent values, drawing accusations of moral imperialism.<sup>88</sup> However, others argue that such a position criticises not universality itself, but the effects of contemporary global hegemony. Upendra Baxi distinguishes the *universality* from the *globalisation* of human rights. The former refers to the gradual process of working to realise the rights claims of oppressed peoples. The latter refers to the quite different practise of using rights discourse as a justificatory discourse for aggressive action against one’s enemies in the global political sphere. This process is barred from true universality by the “moral duplicity” of dominant states who refuse to allow peoples struggling for recognition of their own ‘universal’ human rights the same freedom to use violent

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<sup>87</sup> Fitzpatrick, P. *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) p. 36; Paliwala, ‘Irresolutions of Modernity, Nation and Empire’ *LGD* (2003) (1)

<sup>88</sup> See Steiner, H.J. and Alston, P. *International Human Rights in Context* (Oxford: Oxford University Press, 1996) pp.192-255

means.<sup>89</sup> These criticisms are especially pertinent in the context of this thesis which, in Chapter Five, addresses the binary characteristics of law's inclusion and exclusion from its realm with regard to the parties of legal cases. The concepts and distinctions that are used here to explain and justify the liberals' claims to deontology and universality (here I shall discuss the right/good and *a priori*/empirical distinctions) are inextricably and intimately connected. Distinctions such as that between 'autonomy',<sup>90</sup> and 'heteronomy' and also between 'public' or 'political' self and the 'private' self are discussed to elucidate the ways in which Kant and Rawls present and justify their deontological theories.

### 3.1 *The Right and the Good*

A principle is 'right' (rather than merely good *for* something or someone) if, and only if, it can be shown to have value in and of itself no matter what the circumstances. This does not mean that it has to be shown that in all possible contexts the principle holds, since there are bound to be innumerable conditions and contexts which one could not anticipate. Rather, it must be shown that the said principle has its roots in a ground which is itself stable and constant, rather than one which is vulnerable to the uncertainties of possible consequences and changing context. We have already seen that liberal ideas of the rational and reasonable

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<sup>89</sup> Baxi, U. *The Future of Human Rights* (Oxford and New York, N.Y.: Oxford University Press, 2002) pp.95-6

<sup>90</sup> Definitions autonomy in this section refer only to Kant and Rawls. Habermas uses another definition which will be covered in section 6.3, *infra*.



person and of reason itself form the *a priori* foundations for rightful judgments. These foundations cannot be exposed to empirical doubt. These apparently stable foundations are contrasted to empirical sources of knowledge, which comprise all that cannot be assumed in advance and is discovered only through looking at the world and seeing what is there. The empirical is all that is contingent and unfixed, and as such cannot provide a firm foundation for any theory of justice or moral viewpoint. In liberal theory, the *a priori* is associated with rightness, and the empirical with goodness. That which is merely good cannot be universal because it is defined with reference to empirical, and thus uncertain principles. What is good for me is not necessarily good for you; thus it has only a local application. Rightness, therefore, is guaranteed by following the *a priori* rules of moral reasoning and not through appeal to empirical consequences. In the subsections below, the distinction between right and good is discussed with reference to the idea of the autonomous (or free) agent as one who has the capacity to detach himself from the purely contingent and empirical in order to be guided by universal, deontological (and therefore rational) principles.

### 3.1.1. Kantian Autonomy

We have seen that the only kind of action that Kant regards as moral or rightful is that which is motivated by rational maxims, such as a categorical imperative. Only by acting on such maxims can a person be regarded as having acted autonomously. The heteronomous will by contrast is based on anything other than the moral law,



such as desires and conceptions of the good, and is thus irrational. Kant explicitly links the notion of acting from such a duty to that of deontological Right. In the *Groundwork* he writes: “To be truthful from duty... is something entirely different from being truthful out of anxiety about detrimental results, since in the first case the concept of the action in itself already contains a law for me while in the second I must first look about elsewhere to see what effects on me might be combined with it.”<sup>91</sup> A confusion that arises is this: how can it be that a person is simultaneously bound to obey the moral law and is at the same time autonomous? The answer lies in the fact of universality itself and is one of Kant’s many circular justifications, in which the autonomy of rational human beings is presupposed in order to connect them to the idea of universal principles of morality. Recall that all properly moral principles are those that are objective, and that can be universalised. Being blessed with the faculty of freedom, each person can choose their own maxims on which to act, and so they are not only the addressee but also the *author* of the objective law. This means that a person acting according to a universal maxim acts autonomously despite being duty-bound by the moral law.<sup>92</sup> Individuals express their autonomy by formulating maxims and enacting laws, illustrating their membership of the “intelligible [as opposed to the merely sensible] world”.<sup>93</sup>

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<sup>91</sup> Kant (1998) *supra*, n.14, p.15

<sup>92</sup> Kant (1995) *supra*, n.3, p.108; See also Kant (1991) *supra*, n.6, pp.48-9. This still leaves the confusion that rational persons are ‘free’ to act according to the moral law or not, and also that only when acting according to law they are acting freely (i.e. on universal rather than merely particular maxims).

<sup>93</sup> Kant (1995) *supra*, n.3, p.113

### 3.1.2 Hegel – Universal Personality and Abstract Right

For Hegel, the possibility of a rational viewpoint and of deontological principles depends upon being able to construe persons as free to be self-determining, that is, to detach themselves from dependence upon anything external, determinate or contingent.<sup>94</sup> The achievement of this freedom comes to individuals following a life and death struggle to be recognised as having independent self-consciousness, with the power to abstract from every determining thing or force in the world and to provide itself with content necessary for making judgments.<sup>95</sup> Hegel describes as “personality” this abstraction of the individual and assumes it as the basis for his theory of Abstract Right.<sup>96</sup> Each is “a simple unit inwardly aware of its sheer independence from everything given”<sup>97</sup> and this situation, universally assumed gives rise to a formal, universal “abstract equality” between individuals.<sup>98</sup> In order that the second aspect of this idea of personality – the positive freedom to choose one’s own ends – does not undermine the universalism established by the formal

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<sup>94</sup> Benson, P. ‘The Priority of Abstract Right and Constructivism in Hegel’s Legal Philosophy’ in Cornell, D. Rosenfeld, M., Carlson, D. G. *Hegel and Legal Theory* (New York, N.Y.: and London: Routledge, 1991) p. 174 – 204 at 178; Hegel’s method of distinguishing human agents as such is explained in his *Phenomenology of Spirit* and discussed in s. 5.1, *infra*.

<sup>95</sup> *Ibid.*, p. 179

<sup>96</sup> Hegel (2000) *supra* n.24, s.35

<sup>97</sup> Benson in Cornell et al (1991) *supra*, n.94, p. 183

<sup>98</sup> Hegel (2000) *supra*, n.24, s.49



equality, Hegel regards the contingent world of ‘ends’ as things or objects which can be used as means to furthering the ends of individuals.<sup>99</sup> The relationship of universal, abstract free personality to these contingencies gives rise to what Hegel describes as Abstract Right, and these form the basis for universal mutual respect for each other’s independence<sup>100</sup> and rights of ownership. It is important to appreciate that, for Hegel, there is as yet nothing ethical about this state of affairs: each person is bound to respect the external independence of all others, but beyond these imperatives people are not equipped to make moral choices.<sup>101</sup> To this extent, Hegel’s theory is identifiably liberal in the Kantian sense.<sup>102</sup>

### 3.1.3 Rawls – The Person and Public Reasoning

For Rawls, the difference between Right and Good is understood by differentiating between that which is essential and that which is not essential in persons co-operating in a state of reasonable pluralism. For example it is essential that the person in the real world has the capacity for a sense of justice (‘reasonableness’) and also a sense of what ends are good for him to pursue (‘rationality’). People are considered “free” in respect of having these two powers and “equal” in respect of

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<sup>99</sup> Benson in Cornell et al (1991) *supra*, n.94 at pp.185-6

<sup>100</sup> Hegel (2000) *supra*, n.24, s. 38

<sup>101</sup> *Ibid.*, ss. 37-8, 45, 49, 105

<sup>102</sup> Stillman, P. G. ‘Hegel’s Critique of Liberal Theories of Rights’ in *American Political Science Review* (1974) vol 68 pp 1086-92 at p. 1086

being willing to co-operate with others.<sup>103</sup> The abstraction from the real world achieved by the original position allows the purely formalistic conditions for ‘justice’ to be shown. In the real-world, political conceptions of justice are affirmed on the basis of both moral powers of rationality and reasonableness by “fully autonomous” persons in the real-world.<sup>104</sup> The scheme of liberties (including rights) that the two principles of justice require to be distributed fairly are given to ensure that each person’s moral powers have the opportunity to develop.

As a corollary of this point, persons in a pluralist society are conceived as having a public (reasonable) and a private (rational) identity.<sup>105</sup> One’s public identity is experienced and expressed by individuals that regard themselves as an original source of authentication for public claims, since every reasonable person has an intuitive sense of justice. One’s public identity is fixed; we are not at liberty to change it because it is part of our essential self. Rawls states that the political conception of justice “expresses [citizens’] shared and public political reason”.<sup>106</sup> This conception is “independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm”.<sup>107</sup> These doctrines are determined by one’s private self which, relating to our private conceptions of the good life, is not so fixed because (and this is the other measure of our freedom) we experience

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<sup>103</sup> Rawls (1996) *supra*, n.2, p.19

<sup>104</sup> *Ibid.*, p.77-80

<sup>105</sup> *Ibid.*, p.30

<sup>106</sup> *Ibid.*, p.9

<sup>107</sup> *Ibid.*



ourselves as being at liberty to adopt or reject such conceptions at will.<sup>108</sup> Thus, because we are free, we not only have an undeniable sense of justice,<sup>109</sup> but all our associations, attachments, beliefs and purposes are ours to “revise” and “rationally pursue”.<sup>110</sup> This distinction is important in Rawls’s theory in terms of deontology, because in order for there to be a universal conception of justice in any pluralist society there must be an essential realm (which Rawls calls ‘the Political’) that is shared by all – i.e. it is public – and hence can be assumed as given *a priori*. The ‘Good’ is made secondary to the ‘Right’ on the basis that it occupies ground that cannot be shared by everyone. Having provided his political conception of person, Rawls goes on to apply the same logic of the political to society generally. Having a sense of justice, or reasonableness (everyone’s public identity and the first marker of freedom) people understand that what justice requires of them is to limit their desires and purposes (everyone’s private identity and the second marker of freedom) so as to accommodate the freedom of all others.<sup>111</sup>

Post-metaphysical liberalism accepts that reason may take many forms, represented by the multitude of discourses and potentially conflicting

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<sup>108</sup> Although this thesis does not attempt to explain or take a position on the liberal/communitarian debate, it is worth noting that this is a point of some controversy. Rawls’s notion of the ‘private’ self is fiercely rejected by Michael Sandel, who argues that Rawls leaves the person as someone whose lack of attachments and knowledge of others makes him incapable of forging meaningful relationships or allegiances. See Sandel, M.J. (ed.), *Liberalism and its Critics* (Oxford: Blackwell, 1984) pp. 172-4

<sup>109</sup> Rawls (1996) *supra* n.2, p.19

<sup>110</sup> *Ibid.*, p.20. See also Rawls (1980) *supra*, n.30, p.521

comprehensive doctrines. But in order for Rawls to realise the unifying ambitions of his Political Liberalism, reason must be employed in such a way that it does not exclude any reasonable people. Rawls accepts the classical liberal belief that, in some way, reason must act as a guiding principle if deontological, universal principles are to be constructed. Like Habermas, Rawls maintains that, even if counter-intuitive, such rational principles embody the best safeguard of the most important and non-negotiable characteristics of humanity.<sup>112</sup> Rawls thus devises a system of reasoning on matters of justice that admits only arguments relating purely to the co-operation between free and equal persons, excluding ‘moral’ content as far as possible.<sup>113</sup> Rawls believes that if reason is kept within these narrow confines then it is universally acceptable (providing the people in the society are reasonable). It is, in other words, *public* reason. It is this inclusive form of reasoning that Rawls describes as the sole legitimate form of reasoning of the supreme court of a liberal democratic constitution.<sup>114</sup>

‘Public Reason’ requires a number of closely related conditions to be met by those who engage in political discourse, either as subjects or as legislators. Firstly, everyone must fulfil a requirement of ‘reasonableness’ as outlined above whereby citizens in the real-world propose terms of co-operation which could be accepted by anyone else who regards themselves as free and equal.<sup>115</sup> To be unreasonable is to

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<sup>111</sup> Rawls (1996) *supra*, n.2, p.34

<sup>112</sup> Rawls (1980) *supra*, n.30, p.519

<sup>113</sup> See Gray, J. *Liberalism* (Buckingham: Open University Press, 1995) p. 54

<sup>114</sup> Rawls (1996) *supra*, n.2, Lecture VI, s.6

<sup>115</sup> Rawls, J. ‘Public Reason Revisited’ in Rawls (1999a) *supra*, n.29, p.136, p.394



insist that one's own comprehensive doctrine is the only legitimate perspective.<sup>116</sup> Reasonableness is itself based on 'reciprocity' – meaning simply that each person reciprocally recognises the other as being free and equal and hence of equal worth.<sup>117</sup> So long as this reciprocal regard is maintained, citizens may also make reference to shared history, traditions and aspirations in finding a common viewpoint.<sup>118</sup> Further to the conditions of reasonableness and reciprocity, Rawls adds that legislators and citizens owe a duty of civility to one another. This seems to mean that legislators are bound to speak and act in accordance with the fundamentals of public reason (i.e. reasonably) and the citizens for their part must continually scrutinise legislators and hold them to the requirements of public reason.<sup>119</sup> Public justification requires "proper political reasons" to be given in support.<sup>120</sup> If a conception can only be justified with reference to a comprehensive doctrine (such as religious teaching, moral or philosophical theory) then it cannot be said to satisfy the condition of reciprocity. Reasons relating to 'moral truth' (e.g. the existence of God or the true moral code) may operate as supplementary reasons, but could not count as core justifying reasons because political liberalism has no mechanism for validating such arguments. A reasonably pluralist society achieves

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<sup>116</sup> Rawls, J (1996) *supra*, n.2, p.61

<sup>117</sup> *Ibid.*, p.81

<sup>118</sup> Rawls, J. 'Justice as Fairness: Political not Metaphysical' in *Philosophy and Public Affairs* (1985) 14(3) pp. 223-251, p.230. Arguments in the political sphere are always simply judged reasonable or unreasonable on this basis - see Rawls (1996) *supra*, n. 2, p.394

<sup>119</sup> Rawls, J. 'The Idea of Public Reason Revisited' in Rawls (1999a) *supra*, n.29, p. 135

<sup>120</sup> *Ibid.*, p.152

“stability for the right reasons” when its citizens come to see that the political conception of the person is so fundamental that it provides the basis for an overlapping consensus between all reasonable comprehensive doctrines.<sup>121</sup> Rawls’s remarks on the operation of public reason within the political culture of the liberal democratic state provide a useful indicator of the importance of ‘real-world’ institutions and processes in his later writings. Rawls argues that so long as the justices of the U.S. Supreme Court make decisions by “no other reason and no other values than the political”,<sup>122</sup> there is no need for constitutional first principles to be entrenched (i.e., put beyond amendment, as is the case in Germany<sup>123</sup>), because its decisions will always be those that “all citizens as reasonable and rational might reasonably be expected to endorse”.<sup>124</sup> In this way, the Supreme Court is an ‘exemplar’ of public reason and an example to its citizens.

#### 3.1.4. The Moral, the Ethical and the Freedom of the Individual in Habermas

Understanding Habermas’s view of the deontological requires us to recall the relationship between particular and universal discourses. Habermas believes that in particular contexts, participants of discourse engage in ‘ethical’ discourse, in which prescriptions, or statements of ‘ought’, are always connected to a particular cultural and social context. As such the ‘ought’ is always contingent on what happens to be

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<sup>121</sup> *Ibid.*, pp.388-390

<sup>122</sup> Rawls (1993) *supra*, n.114, p. 235

<sup>123</sup> *Ibid.*, p. 234

<sup>124</sup> *Ibid.*, p.236



the practises of the particular people in a certain time and place, and given as a means to achieving some particular good.<sup>125</sup> Knowledge of what one should do is derived from the “unquestioned truths” of one’s own lifeworld.<sup>126</sup> To enter into moral discourse, on the other hand, one is required to break away from these unquestioned truths and distance oneself from them in order to accommodate a universal viewpoint.<sup>127</sup> Instead of a common ethical culture, morality is founded in the presuppositions of rational communication.<sup>128</sup> However, moral discourse is not entirely cut off from its particular participants. Habermas explicitly aligns his discourse theory with Hegel in insisting on “the internal relation between justice and solidarity.”<sup>129</sup> He reminds us that his universal moral point of view is not that of an external viewer, but the universal participant of discourse.<sup>130</sup> Habermas accepts the contextualist claim that the moral world “reveals itself only from within” and thus an elevated third person viewpoint could not get a proper look (so to speak).<sup>131</sup> Instead, the universal moral viewpoint “emerges” from communicative action as idealised through the presuppositions of argumentation. In *Communicative Action*, rational agreement on normative questions is derived from

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<sup>125</sup> In Kantian language ethics is the realm of hypothetical imperatives.

<sup>126</sup> Habermas (1993) *supra*, n.54, p.12

<sup>127</sup> *Ibid.* See also Habermas (1996) *supra*, n.56, p.258, where he insists that in discourse theory, moral discourse does not depend upon any “concrete substantively integrated community”.

<sup>128</sup> Habermas (1996) *supra*, n.56, p. 298

<sup>129</sup> Habermas (1993) *supra*, n.54, p.1

<sup>130</sup> *Ibid.*, pp 48-9

<sup>131</sup> *Ibid.*

the particular claims made by participants, who themselves accept the rational presuppositions of communication. In moral discourse the participants' own particular interested arguments are made, and only those that can stand up to the objections and questions of all the others, and are backed by universally accepted reasons, can claim to enjoy "rationally motivated agreement".<sup>132</sup> In order to achieve this, each participant is required to "project" himself to the position of all the others.<sup>133</sup>

Habermas argues that a conception of language as publicly shared – transcending the borders of private experience, following insights of Frege<sup>134</sup> and Peirce<sup>135</sup> – is what makes it possible for law to play such a crucial role between particular individuals and universal validity. This conception is that language, and crucially the meanings of words, does not belong to an individual user; it is shared by a community of language users. Hence, concepts mean identical things to different users and concepts are "intersubjectively recognisable".<sup>136</sup> Questions of normativity are regarded in a Peircian triadic fashion: Every proposition is regarded as representing something for interpretation by a language-using community.<sup>137</sup> In

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<sup>132</sup> *Ibid.*, p.53

<sup>133</sup> *Ibid.*, p.50

<sup>134</sup> Frege, G. *Logical Investigations*, Geach, P.T. (ed.), Geach, P.T. and Stoothoff, R.H. (trans.) (New Haven, Conn., 1977) p.24; cited in Habermas (1996) *supra*, n.56, p.10

<sup>135</sup> Peirce, C. S. *Collected Papers*, 6 vols. Hartshorne, C. and Weiss, P. (ed.) (Cambridge, Mass.: Harvard University Press, 1935) 5: p. 311; cited in Habermas (1996) *supra*, n.56, p.15

<sup>136</sup> Habermas (1996) *supra*, n.56, p.13

<sup>137</sup> *Ibid.*, p.14



this way a community will be able to agree through communication whether or not a certain proposition is valid or not. Applying this to the question of moral discourse, language acts here as a mediator for all citizens to make decisions based on common interpretations of the problems they encounter. Language mediates between the fractured relationship of fact and validity<sup>138</sup> to allow citizens to produce valid moral judgments. The fact/validity tension “moves into the presuppositions of argument”,<sup>139</sup> where to enter into argument over the truth of any statement is to unavoidably accept the presupposition of rational discourse and hence engage in communicative reason.

The duty of universalisation placed upon participants of argumentation is not supposed to impose superhuman burdens of foresight, empathy and organisation. Rather, reasonable consequences of a proposed norm on the participants must be considered<sup>140</sup>. When *prima facie* valid legal norms clash, participants must decide discursively which is to prevail, based on the generalisable interests at stake<sup>141</sup>. Objectivity – the moral point of view – can thus only arise through encountering another with the goal of coming to an understanding. It is

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<sup>138</sup> i.e. the *fact* that a particular belief is held or activity practised and the *validity* of such beliefs or activities as a universal maxim.

<sup>139</sup> Habermas (1996) *supra*, n.56, p.16

<sup>140</sup> Habermas (1993) *supra*, n.54, p.37

<sup>141</sup> Habermas (1996) *supra*, n.56, p.64. However, this is a potentially critical problem for communicative rationality. How is a matter to be resolved, as Julia Black rhetorically asks, if participants cannot even agree as to whether an argument is a moral or a merely technical one? (Black (2001) *supra*, n.83, pp. 44-5)

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<sup>140</sup> Habermas (1993) *supra*, n.54, p.37

<sup>141</sup> Habermas (1996) *supra*, n.56, p.64. However, this is a potentially critical problem for communicative rationality. How is a matter to be resolved, as Julia Black rhetorically asks, if participants cannot even agree as to whether an argument is a moral or a merely technical one? (Black (2001) *supra*, n.83, pp. 44-5)



only through such an encounter that people “can and must” recognise each other as deserving of moral regard.<sup>142</sup> It is this moral regard that the ideal speech situation aims to foster in providing the conditions for each person to address his or her concerns to a universal audience. Habermas’s concern not to break the thread that he spins between the local contexts of particular lives and universal morality does present certain conceptual difficulties. Not only does the distinction between ethics (‘what is good for *us*?’) and morality (‘what is good for *everyone*?’) strike some as an artificial one; it is also not entirely clear that this would be a desirable achievement anyway.<sup>143</sup> What can the terrorist attacks in New York 2001 and

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<sup>142</sup> Habermas (1993) *supra*, n.54, p.66

<sup>143</sup> See Bernstein, R.J. ‘The Retrieval of the Democratic Ethos’ in M Rosenfeld and Arato, A. *Habermas on Law and Democracy: Critical Exchanges* (London: University of California Press, 1998) pp. 287-305. Bernstein describes the distinction as “a violently distortive fiction” (p.301). Since the presuppositions of rational communication are apparently not contingent on any particular community, Habermas is clearly seeking to establish a universality that avoids criticism as being Eurocentric. In doing so, however, he is arguably presenting an ambiguous argument. Bernstein argues that Habermas is wrong to suppose (See Habermas (1996) *supra*, n.56, pp. 278-9, p. 298) that discourse ethics can do without a substantive *sittlichkeit* in the Hegelian sense of a shared “democratic ethos” (Bernstein in Rosenfeld and Arato (1998) p.290) and a common exercise of “virtues” (*ibid*, p.294) to ensure that decisions are determined by the best arguments (*ibid*, p.291).

See also Michelman, F.I. ‘Family Quarrel’ in Rosenfeld and Arato (1998) *ibid*, pp. 309-322, p.320. Michelman argues that the intersubjective recognition that Habermas strives for is impossible without a commitment to a shared cultural and historical context from which participants “draw their meaning”.

Madrid 2004 represent if not a certain impotence of such appeals to universal morality underpinned by liberal ideals of communication? However, Habermas has recently reiterated his argument with even greater urgency. Habermas is adamant that if the attacks such as those of September 11<sup>th</sup> 2001 carry any enlightening message for western governments, it is to work to build up a relationship of “trust” between themselves and other nations by addressing economic and power imbalances. The purpose of such work is, for Habermas, the development of communicative practises between cultures, allowing ethical values to be tested against the universal.<sup>144</sup> If the cycle of attack and counter-attack that terror and retaliation engender is to be broken, it will only be through a common orientation towards this goal of mutual understanding.<sup>145</sup>

Habermas’s separation of the moral and ethical enables us to glimpse his conception of the individual as an autonomous agent. For Habermas, human autonomy is inextricably bound up with the conditions of the ideal speech situation. Not only does the possibility of realising communicative ideals depend upon the participants’ abilities to understand and participate in rational discourse, but each

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See also Fraser, A. ‘A Marx for the Managerial Revolution: Habermas on Law and Democracy’ J of L & Soc (2001) 28 (3) pp. 361-383. Fraser maintains (*ibid*, p.378) that Habermas’s discourse ethics is disengaged from “established ways of life” and thus undermines the spiritual cohesion of western societies in favour of wealth and power-hungry managerial elites. Without a shared ethnic history and ethical sentiments, a society is trapped in a “system drained of any meaning, value or purpose.” (*ibid*, p. 383)

<sup>144</sup> Borradori, G. *Philosophy in a Time of Terror* (London and Chicago: University of Chicago Press, 2003) p. 36



individual participant is also dependent upon the emancipatory qualities of the communicative ideal itself.<sup>146</sup> In order to achieve a rational consensus in the ideal speech situation, participants must have recourse to an “appropriate” language. That is to say that there must be a language in which “participants in the discourse can make their *inner natures* transparent and know what they *really* want.”<sup>147</sup> In the ethical life, in which ‘oughts’ are derived from one’s own community values, such self knowledge is not certain, as different communities will be at variance in terms of the level of equality of participation and lack of coercion. Only the ideal speech situation – the conditions of moral discourse rather than the merely ethical – can guarantee the requisite level of freedom for participants to know what they can achieve. In *Between Facts and Norms* Habermas argues that law represents a universally appropriate language by virtue of its power to mediate between communities and allow norms to penetrate *all* of society<sup>148</sup>. In ensuring that each participant of discourse has an equal chance to raise arguments and question others (through human rights provisions in law),<sup>149</sup> they are in a position to realise their “inner nature” and thus gain full freedom within discourse. In this sense, the

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<sup>145</sup> *Ibid.*, p.38

<sup>146</sup> Habermas, ‘Wahrheitstheorien’ in Fahrenbach (1973) *supra*, n.69, p. 251; cited in Bernstein (1995) *supra*, n.69, p.52-3; It on this point of freedom through intersubjective recognition that Habermas is comparable to Hegel, whose own perspective on the matter is discussed in s. 5.1 below.

<sup>147</sup> Habermas, *ibid.* p.251; quoted in Bernstein, *ibid.*, p.53, emphasis added.

<sup>148</sup> Habermas (1996) *supra*, n.56, p. 56

<sup>149</sup> *Ibid.*, p.88-9

Habermasian concept of the autonomous legal actor is richer than that of Kant, whose monological moral theory grounds only a negative idea of freedom.<sup>150</sup>

#### 4. Legal and Political Theory from Liberal Universal Viewpoint

In general terms, ‘political’ theory in its modern western sense is largely concerned with questions regarding democracy. To a greater or lesser extent, to be a liberal political theorist is also to be a liberal democrat (in the non party-political sense). Despite conceptually separating the universal from the particular and contingent, liberals in the Kantian tradition acknowledge that in order to engage with the political, it is necessary to expose carefully and rationally derived matters of principle to the unpredictable contingencies of a voting population. However, this does not necessarily mean that a concern with the ‘political’ involves a surrender of the moral high ground. The extent to which the attempts by Rawls and Habermas to accommodate a theorisation of democracy within their liberalisms signifies such a surrender is an on-going moot point which we shall discuss in s.4.2.<sup>151</sup> For each of

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<sup>150</sup> Bernstein (1995) *supra*, n.69, p. 55

<sup>151</sup> Contrast, for instance Melissa Williams’s assertion that Rawls represents a purely procedural account of justice (Williams, M., ‘Justice Toward Groups: Political not Juridical’, 23 *Political Theory* (1995) pp. 67-91) with Tom Bridges’ view that the later Rawls adopts a broadly substantive, culturally contingent approach (Bridges, T., ‘Review: *Political Liberalism* by John Rawls (3): Rawls and the Rethinking of the Priority of the Right over the Good’ in *Philosophy and Civic Culture: Inventing Postmodern Culture* (<http://www.civsoc.com/reviews/review1c.html>)). See also s.4.2.1 of this chapter, *infra*, where we return to this debate.



these theorists, the ‘meeting’ between liberal principle and democracy involves an account of the individual’s participation within the public affairs of society. These accounts represent varying attempts to give the abstract individual flesh without compromising liberalism’s universality. The paragraphs below first examine firstly Hegel’s account of the individual’s achievement of real freedom, and then the attempts by Kant, Rawls and Habermas to locate the role of the ‘free’ and ‘equal’ individual within the democratic process.

#### 4.1 *Hegel – Concrete Universality and Self-consciousness*

It is not difficult to conceive a role for democracy in Hegel since, as we have already noted, participation in public life is given a central place in developing his notion of real freedom. Hegel’s self-conscious, free individual is one who gains the ability to independently shape and transform the world and accordingly win recognition from others in public life. It is through such recognition that the Hegelian individual emerges from its abstraction and becomes a fully formed citizen, capable of taking an active part in all areas of public life and of making moral judgments. The reunification of the ‘abstract’ individual and the world of contingencies forms the final stage of Hegel’s *Absolute Reason* and heralds the attainment of ‘concrete universality’. Although forming only a part of Hegel’s philosophy of consciousness, the allegory of the ‘Lord and Bondsman’<sup>152</sup> has been

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<sup>152</sup> Hegel, G.W.F. *Phenomenology of Spirit*, Miller, A. V. (trans.) (Oxford: Oxford University Press, 1977) ss.187 - 196

interpreted by modern theorists as illustrating the importance of democratic participation in allowing people to realise their innate nature as free.<sup>153</sup> Through this allegory of a life and death struggle – and the aftermath of that struggle – for the recognition of one's independence, Hegel seeks to determine how a distinctly human consciousness can arise. Hegel presents us with the character of a Lord – who, having won an initial struggle for supremacy, holds another as his Bondsman to work and provide for him.<sup>154</sup> The initial struggle illustrates the human desire to establish its own independence from nature (and hence distinction from and superiority to it) in the eyes of another. The loser of this struggle is he who “fears death more than he desires recognition”<sup>155</sup> and thus failing to sustain his independence from nature, becomes the Bondsman of the winner. The problem is that full independence and self-consciousness has not yet been achieved: the Bondsman (of course) is shown up in his inadequacy and the Lord, although having

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<sup>153</sup> See Taylor (1989) *supra* n.22, p. 866. See also Bernstein, J. M. ‘From Self-Consciousness to Community: Act and Recognition in the Master-Slave Relationship’ in Pelczynski (1984) *supra*, n.21, pp. 14-39. See also Butler, J. *Subjects of Desire: Hegelian Reflections in Twentieth Century France* (New York, N.Y.: Colombia University Press, 1999)

<sup>154</sup> Hegel (1977) *supra*, n.152, s.189

<sup>155</sup> Bernstein in Pelczynski (1984) *supra*, n.153, p.16; Bernstein notes (p.17, pp.21-22) that although Hegel characterises this struggle for independence as being one to the death, it cannot be actually fought to the death, since – a) natural life is essential for independence, thus full independence from nature is not possible; b) if the loser actually dies then the victor wins no actual recognition from his other and thus the victory is self-defeating. This is why the Lord lets the Bondsman live after the struggle is over.



won the initial struggle and enjoying the product of the Bondsman's labour,<sup>156</sup> gains only an inadequate recognition for this since he who recognises him is an inferior.<sup>157</sup> Furthermore, he soon realises that, in order to maintain his position of supremacy, he is in fact dependent upon the latter's work.<sup>158</sup>

It is through the Bondsman's labour that Hegel traces the development of true recognition and thus *real* freedom. Despite his initial failure to detach himself from nature, the Bondsman finds that by working on and thereby shaping and transforming his environment, he gains mastery over it.<sup>159</sup> In being so effective, he discovers that his work is valued by the Lord. He thus gains the recognition that he previously craved and was denied, and so begins to realise his "true nature" – his own "independence".<sup>160</sup> In this sense he gains a distinctly human subjectivity, self-consciousness and freedom from bondage. Although this allegory is a philosophical account of consciousness rather than an explicitly political treatise, reflection on what is meant by 'work' and what is involved in 'recognition', allows us to appreciate its political significance also. In order for individuals to flourish, they require, not just the ability to work, but to be recognised and confirmed as having independent value by others.<sup>161</sup> We are invited to consider that human agency and

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<sup>156</sup> Hegel (1977) *supra*, n.152, s. 190-1

<sup>157</sup> *Ibid.*, s. 192

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*, s.194: "Through his service he rids himself of his attachment to natural existence in every single detail; and gets rid of it by working on it."; s.195: "Work forms and shapes the thing."

<sup>160</sup> *Ibid.*, ss 194-6

<sup>161</sup> Butler (1999) *supra*, n.153, p.58

freedom is discovered through shaping the world – that is – *humanising* it under conditions in which this work can be recognised. Transplanting this notion to the conditions of the modern democratic state provides the groundwork for a theory of active participation in the generation and critique of legal, moral and social forms of one's community.<sup>162</sup>

It is in this light that the Hegelian aspects of Habermas's idea of 'appropriate' language (discussed above) can be appreciated. For both Hegel and Habermas there is a sense in which a person's true nature is exposed under certain conditions of public life, enabling a genuinely emancipatory participation in society. Such conditions are surely those of a liberal democratic state, in which its citizens are recognised as valuable and independent through participation in public discourse. Baxi identifies the (often violent) struggles amongst localised communities for recognition and enjoyment of their human rights with this movement towards concrete universality.<sup>163</sup> Arendt's comments on the role of "speech and action" in public life as simultaneously distinguishing and uniting individuals.<sup>164</sup> They emphasise the emancipatory implications of an adapted Hegelian intersubjectivity.<sup>165</sup> It is difficult to imagine citizens adopting a self-

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<sup>162</sup> See Bernstein in Pelczynski (1984) *supra*, n.153 p.38: "We can now be truly self-conscious agents only by participating in the formulation of such a community."

<sup>163</sup> Baxi (2002) *supra*, n.89 at p.95

<sup>164</sup> See Arendt, H. *The Human Condition* (Chicago, I.L. and London: University of Chicago Press, 1998) Chapter V, p.180

<sup>165</sup> *Ibid.*, p. 176: "A life without speech and action... has ceased to be human life because it is no longer lived among men". At p. 178: "[S]peech corresponds to the fact of distinctness and the



conception as fully free or self-conscious within public life without there being space for such a role.<sup>166</sup> Hegel's own development of the idea of the fully 'free' individual as a participant in public life goes beyond mere Abstract Right, as he provides an account of the choices available for action.<sup>167</sup> This is why, following the sections on Abstract Right, the *Philosophy of Right* moves on to discuss the content of this right, and hence the building up of the full individual with ends and purposes<sup>168</sup> who owes allegiance both to historically and culturally determined social norms (*Sittlichkeit*) and to the universal moral order.<sup>169</sup> It is Hegel's unification of the individual and rational state through a theory of their respective roles in family and ethical life and civil society that forms the towering monolith of Hegelian *Absolute Reason*. It is this that Habermas regards as most different to his own discursive approach which, although maintaining an internal link between justice and community, disconnects the universal from ethical life to avoid Hegel's totalising implications.

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actualisation of the human condition of plurality, that is, of living as a distinct and unique being among equals."

<sup>166</sup> For instance, Taylor links the Bondsman's struggle for recognition to Hegel's "civic humanism" (Taylor (1989) *supra*, n.22, p. 863). Individuals are recognised as a "public space" (p. 865) for discourse on moral and political matters.

<sup>167</sup> Hegel (2000) *supra*, n.24, ss. 35-59

<sup>168</sup> *Ibid.*, ss.105-40 on morality, ss.158-181 on family life, ss.182-256 on civil society.

<sup>169</sup> Taylor (1989) *supra*, n.22, p. 864. In this way, Hegel provides a critique of Kant's attempt to establish a political theory directly from the external doctrine of Right in which (like Hegel's own 'Abstract Right') each rational person respects the freedom of every other (Stillman (1974) *supra*, n.102 at p. 1089).

## 4.2 *Liberalism and Democracy in Rawls and Habermas*

The tension between principles of right and the democratic participation has given rise to a fierce debate between the Post-metaphysical liberals. Theories of justice risk, on the one hand, undemocratically imposing moral laws and, on the other hand, a majority sovereign people enacting laws that are perceived as unjust by minority groups. Rawls points to exactly this problem when he states: “Although in given circumstances it is justified that the majority (suitably defined and circumscribed) has the constitutional right to make law, this does not imply that the laws enacted are just.”<sup>170</sup> We find a similar concern expressed in *Political Liberalism*: “No institutional procedure exists that cannot be abused or distorted to enact statutes violating basic constitutional democratic principles.”<sup>171</sup> In the *Theory*, Rawls addresses this by bracketing it out of his wider concern with procedural justice. For instance, the question of which minority practices should be protected and which are ‘illicit’, “does not belong to the theory of justice.”<sup>172</sup> In later attempts to address the problem in the context of the U.S. constitution, Rawls seeks to protect its basic principles by invoking the role of the Supreme Court as protector of the “Higher law” from “transient majorities”<sup>173</sup> by always using public reason to

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<sup>170</sup> Rawls (1999) *supra*, n.34, p.313

<sup>171</sup> Rawls, J. *Political Liberalism* (New York, N.Y. and Chichester: Columbia University Press, 1993) p.233

<sup>172</sup> Rawls (1999) *supra*, n.34, p.313

<sup>173</sup> Rawls (1993) *supra*, n.171, p.233



reach its decisions.<sup>174</sup> In addition to the definitions of ‘autonomy’ already discussed above, the rights-democracy tension in legal and political discourse provides another pair of definitions: ‘public autonomy’ is a person’s freedom to involve himself in the democratic process of political will formation, and ‘private autonomy’ refers to the rights of one person against interference from others. Habermas criticises both Kant and Rawls for prioritising private autonomy (rights) over public autonomy (democracy) by generating the two principles of justice in the original position before the citizens of the real-world have a chance to question or debate them.

#### 4.2.1 Private Rights and Popular Sovereignty in Rawls’s Justice as Fairness

Habermas argues that the approaches of both Kant and Rawls to law subordinate democracy to liberalism, in both cases democratic participation is preceded by a pre-political philosophical conception of essential first principles.<sup>175</sup> The “original contract”<sup>176</sup> is Kant’s idealisation of the general will of rational citizens and illustrates their capacity as rational beings to be both as legislators and subjects of laws. The ‘original contract’ effectively legalises the innate rights of freedom and equality and the derivative rights and sets the legal order in its place within Kant’s

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<sup>174</sup> See s. 3.1.3, *supra*.

<sup>175</sup> Habermas, J (1996) *supra*, n.56, p. 94

<sup>176</sup> Kant (1991) *supra*, n.6, p.47

metaphysical order.<sup>177</sup> For Rawls, the two essential principles by which a political society is to be governed<sup>178</sup> are decided behind the veil of ignorance in the original position – i.e. before the citizens of the real world have a chance to wield their democratic powers.<sup>179</sup> Thus, Habermas argues that justice as fairness “demote[s] the democratic process to an inferior status”,<sup>180</sup> and also undermines citizens’ public autonomy since they “cannot re-ignite the radical democratic embers of the original position in the civic life of their society.”<sup>181</sup> Furthermore, since the two first principles of justice are already secured in the original position, Rawls’s later appeal to the real-world formulation of principle serves, not to secure the democracy of the principles, but only to weaken his universalism<sup>182</sup>. As the essential liberties are decided in the original position they can only be conceived as

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<sup>177</sup> *Ibid.*, p.48. It should be noted here the distinction between Kant and Hegel on the passing from pre-political to political society. Whereas for Kant this represents a necessary limitation of naturally clashing interests, for Hegel it represents the realisation of liberties in a social context in which man as an abstract rights-bearer becomes a fully free individual (Stillman (1974) *supra*, n.102, p. 1092)

<sup>178</sup> See this chapter, s. 2.3, *supra*.

<sup>179</sup> Habermas, ‘Recognition Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism’ *Journal of Philosophy* Vol. 92 (March 1995) p.128

<sup>180</sup> *Ibid.*, p.127-8; cited in Rawls (1996) *supra*, n.2, p.396

<sup>181</sup> *Ibid.* Cited in Rawls (1996) *supra*, n.2, p.400

<sup>182</sup> Habermas (1996) *supra*, n.56, p. 59-63. However Habermas rejects as “not plausible” (62) Rorty’s argument that Rawls’s appeal to “those shared notions and principles thought to be already latent in the common sense” (Rawls (1980) *supra*, n.30, p.518; quoted in Habermas (1996) *supra*, n.56, p.59) represents a wholesale rejection of universalism.



occupying a “pre-political domain” and thus as given metaphysically.<sup>183</sup> Rawls’s response to Habermas is to deny that the operation of the original position is either fixed by philosophical method or out of reach from real-world citizens. First, he argues that the operation by which principles are derived in the original position should not be regarded as an actual political process (which indeed would deprive ‘real-world’ citizens of choices) but as a “framework of thought”<sup>184</sup> for any society that chooses to make use of the insights of justice as fairness. If public autonomy is conceived in the narrow sense of terms of co-operation based on the two moral powers of rationality and reasonableness then this ‘framework of thought’ can always be used to critically reflect upon proposed new laws and judgments. The exercise of public autonomy requires a capacity to involve oneself in public discussion of political principles, and Rawls insists that the original position does not hinder this.<sup>185</sup> The two principles chosen in the original position are not compulsory. Although Rawls’s continued unease regarding the prospect of anti-liberal majorities does lead him to assert that “right and just constitutions and basic laws” are *not* ascertained through actual political process,<sup>186</sup> he makes it clear that his idea of ‘justice as fairness’ is only one of many possible political conceptions of justice that free and equal citizens may choose to adopt.<sup>187</sup> Rawls’s second point, against Habermas’s charge that for Rawls private rights are pre-politically and

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<sup>183</sup> Habermas, (March 1995) *supra*, n.179, p. 129; Cited in Rawls (1996) *supra*, n.2 at p.404

<sup>184</sup> Rawls (1996) *supra*, n.2, p.397

<sup>185</sup> *Ibid.*, p. 402

<sup>186</sup> Rawls (1993) *supra*, n.171, p. 233

<sup>187</sup> Rawls (1999a) *supra*, n.29, p.141

metaphysically assumed, is that although the moral powers are indeed assumed, the rights in themselves do not have prior, or given, status.<sup>188</sup> Rawls emphatically rejects the accusation of metaphysics by repeating his argument that the conception of the person is a ‘political’ rather than an ethical or a philosophical one. That is, instead of being a metaphysical principle of reason in the Kantian sense, “it is realised in public life by affirming the political principles of justice and enjoying the protections of the basic rights and liberties... [and] by participating in society’s public affairs and sharing in its collective self-determination over time.”<sup>189</sup> On the dilemma between liberal rights and popular sovereignty, Rawls agrees with Habermas that neither should be regarded as prior to the other, but argues that Habermas is wrong to characterise ‘justice as fairness’ as being tied to Kant’s metaphysical prioritisation of liberal rights at the expense of accounting for democracy.<sup>190</sup> Rawls points out that, in the original position public and private rights are given equal weight by the parties selecting them, and all find their authority in the two moral powers.<sup>191</sup> The dilemma between rights and popular sovereignty is not really a dilemma at all, since it is simply a burden on any democratic state to balance them and strive for both.<sup>192</sup>

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<sup>188</sup> *Ibid.*, p.404-6

<sup>189</sup> *Ibid.*, pp. 77-78

<sup>190</sup> *Ibid.*, p 411-12

<sup>191</sup> *Ibid.*, p.413

<sup>192</sup> *Ibid.*, p.416. An alternative response to Habermas’s criticisms (and we do not have space to do more than merely draw attention to it here) would be to introduce a notion of ‘group’ or ‘collective’ rights into liberal political theory. What Habermas regards as the subordination of



#### 4.2.2 Communicative Action: The Internal Connection between Rights and Popular Sovereignty

Habermas argues that where Kant and Rawls go wrong is in not appreciating the importance of the discursive process of public will formation. He contends that what is required is institutionalisation of the democratic process through human rights principles in order that even the very first principles of justice are validated by universal agreement. The presuppositions of rational communication – e.g.

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democracy to liberalism by Rawls is in part due to Rawls's view that the primary goods accrue only to individuals rather than groups. But as critics such as William Kymlicka have argued, not everything that is fundamental to our lives can be described as resources for distribution between individuals. The survival of minority cultures and linguistic groups, for instance, is believed by some as crucial to individuals in determining their own life-choices and as such may be regarded being as important as the 'primary goods' that Rawls lists. Promoting the general interests of the inhabitants of a multicultural society would therefore involve the protection, not only of liberties that attach to individual citizens, but also to the groups themselves. (See Kymlicka, W. *Multicultural Citizenship* (Oxford: Clarendon Press 1995) Chapter Three). The liberty in question here is not simply that of the individual's right to be affiliated to a group, but of that groups' right to representation in the democratic process (*ibid*, p. 36). Such an approach is not adopted by Rawls because of his assertion in the *Theory* that notions of affiliation and minority interests are not *per se* part of his theory of justice, nor his notion of 'public reason' in later writings. They instead

freedom, equality and non-coercion of participation in argumentation – are translatable into legal rules. This is Habermas’s “discourse principle”,<sup>193</sup> and it operates in both the realm of morality (the “moral principle”<sup>194</sup>) and law (the “democracy principle”<sup>195</sup>). When universal agreement is reached under the rules of democratic argument, the resulting agreement expresses the will of “freely associated legal persons” and is therefore legitimate.<sup>196</sup> Habermas describes the democracy principle as the result of an “interpenetration”<sup>197</sup> between the discourse principle and the legal language of rights. Legal rights promoting both public and private autonomy are defined and validated when the discourse principle is applied in legal argumentation. This is because, in securing the conditions for rational communication, the discourse principle fosters a reciprocal regard between persons as both authors and addressees of laws. Hence the legal norms finally validated in argument are those that reflect this dual character; public and private autonomy of each person is thereby protected simultaneously.<sup>198</sup> At the same time the discourse principle is shown to be the key to regulating and thus legitimating positive law. Rawls’s objection to Habermas’s claim to have secured rights and popular

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form the background against which individuals find themselves in a society premised on Rawls’s two principles of justice.

<sup>193</sup> Habermas, J (1996) *supra*, n.56, p. 107

<sup>194</sup> *Ibid.*, p.108

<sup>195</sup> *Ibid.*, p.111

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*, p.121

<sup>198</sup> *Ibid.*, p.123



sovereignty together is that, whereas Political Liberalism finds basic rights and liberties which foster and encourage individuals' essential moral powers, Habermas is concerned with wider, philosophical theory of reason in the Hegelian sense. Indeed, Habermas's claim that the democracy principle ensures a full role for democratic participation is only convincing if we can accept that the communicative presuppositions are not merely pre-political moral principles constructed by Habermas to ensure that his own preferred understanding of political democracy seems best. Rather than leaving comprehensive doctrines alone, Habermas criticises them, which means (for Rawls) that communicative reason is itself a comprehensive doctrine,<sup>199</sup> or in other words, "metaphysical".<sup>200</sup> For others, the most significant problem is Habermas's use of law as an impartial meta-language to ensure that different claims are understood. If our aim is to ensure that different voices are given proper institutional attention, then it could be argued that the law – which converts all discourses on its own terms - is part of the *problem* rather than the solution.<sup>201</sup> This is especially so where there is no direct translation from a particular claim into legal language. For this reason, critics such as Young and Oquendo argue that Habermas's view that only serious, rational arguments are

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<sup>199</sup> Rawls (1996) *supra*, n.2, p.377

<sup>200</sup> *Ibid.*, p.379

<sup>201</sup> Murphy, W.T. *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Oxford University Press, 1998) p.70. See also J. Black (2001) *supra*, n.83 at p.44

permitted should be widened to include other forms of expression such as storytelling, rhetoric, poetry,<sup>202</sup> theatrical and even sporting metaphors, etc.<sup>203</sup>

## 5. Metaphysics and Post-metaphysics

It is clear that Habermas and Rawls both accept the disintegration of classical enlightenment metaphysics.<sup>204</sup> As Habermas defines it, “metaphysics believes it can

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<sup>202</sup> Young, I. ‘Justice and Communicative Democracy’ in Gottlieb (ed) *Radical Philosophy: Tradition, Counter-Tradition, Politics* (Philadelphia: Temple University Press, 1993) pp.129-131

<sup>203</sup> Oquendo, A. R. ‘Deliberative Democracy in Habermas and Nino’ (2002) OJLS 22 (2) pp. 189-226, p. 221. As Oquendo argues, democracy can be deliberative, but this is not all that democracy is, and whilst Habermas is right to posit Human Rights language at the heart of the process, his exclusion of non-deliberative aspects limits his understanding of democracy. Habermas’s ‘democracy principle’ is not *the* principle of democracy – merely one of many ‘pictures’ that we might construct of it (*ibid*, pp.220-1). Similarly, Fraser criticises Habermas for excluding the “dead and unborn” from his construction of democracy (Fraser (2001) *supra*, n.143, p. 379). Developing his argument that legal language must be rooted in ethno-cultural traditions, a society’s past and its future are as much a part of the formation of legal norms as the living, discursive present. On this point, Fraser adopts Robert Cover’s notion that the law is meaningful because it is not merely a set of rules, but the world in which we live, see Cover, Foreword: ‘Nomos and Narrative’, Harvard LR (1983) 97(4), pp.11-19. See also Scruton’s idea that society is not ‘political’ but ‘social’ (Scruton, R. *The Philosopher on Dover Beach: Essays* (Chicago, I.L.: St. Augustine’s Press, 1998) pp. 311-12).

<sup>204</sup> See Habermas (1996) *supra*, n.56 at p.98



trace everything back to one”<sup>205</sup> – that all effects can be unified in a single cause. ‘Post’-metaphysical liberalism regards this acceptance as crucial in order to maintain a sense of justice in pluralist, democratic societies, in which the idea of the ‘one’ has become degraded and undermined by Post-metaphysical perspectives.<sup>206</sup> Habermas and Rawls agree that systems of thought such as Kant’s practical reason make presuppositions which could not be universally shared in a society of disparate and conflicting moral beliefs.<sup>207</sup> Unlike the classical liberals they know that there is very little that can be accepted as given by all people. Therefore, although Post-metaphysical liberal theory must still find some way to protect the universal rightness of its principles from unreliable empirical contingencies, metaphysics is “generally implausible”.<sup>208</sup> What remains open to Post-metaphysical liberals is a commitment to political conditions that will promote the liberal conception of the person as free and equal. Hence the ‘new’ universal involves a political decision: the metaphysical mystery that nags at Kantian morality (the always present “but from where do you derive *that...*?”) is replaced by an acceptance that in order to find the required foundations for moral or legal principles, we must decide what kind of society we wish to inhabit. It is for this reason that the Rawls of *Political Liberalism* finds his principles of justice

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<sup>205</sup> Habermas (1992) *supra*, n.64 at p.115, 29-30

<sup>206</sup> *Ibid.*, p. 116

<sup>207</sup> Rawls (1996) *supra*, n.2 at p.99; Rawls (*ibid*, p.400) notes that Kant presupposes an idea of autonomy, itself given by reason, which, involving a notion of morality, is too broad to be accepted universally.

<sup>208</sup> Habermas (1996) *supra*, n.56, p.xiii

confirmed not only in the abstract original position, but also in the particular context of western political society. For this reason, Rawls points to the central place of ordinary real-world citizens in his theory, who have the power to critically reflect and negotiate conceptions of justice.<sup>209</sup> This assumption is clearly necessary in a society in which the ‘citizens’ are to play any part in the political process. The universalist abstraction of the original position is pulled down to the ground in *Political Liberalism* by being rooted in the particular political culture of western democracy.<sup>210</sup> Rawls accepts that the grounding of political liberalism both in the abstraction of the original position and the empirical world of western political democracy blurs the distinction between procedural and substantive justice. He states “the justice of procedure always depends upon the justice of its likely outcome, or on substantive justice.”<sup>211</sup> In other words, the presupposed conditions for deriving just principles cannot exclude consideration of what principles might, in fact, be derived – procedure alone cannot guarantee an acceptable state of affairs.<sup>212</sup> Both Rawls and Habermas retain a reasoned approach to deriving rules from first-principles, even if these are described as ‘unavoidable’ (Habermas) or ‘political’ (Rawls).

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<sup>209</sup> Rawls (1996) *supra*, n.2, p.384

<sup>210</sup> Rorty describes Rawls’s grounding of liberal principles in a political rather than philosophical conception as “thoroughly historicist and anti-universalist”, in Rorty, R. *Objectivity, Relativism and Truth: Philosophical Papers Vol. 1* (Cambridge: Cambridge University Press) p.180

<sup>211</sup> Rawls (1996) *supra*, n.2, p.421

<sup>212</sup> *Ibid.*, pp.421-433



It might be asked how successful Rawls and Habermas are in escaping from Kant's metaphysical conception of just laws as derived from the objective moral law. Even considering his insistence in later works that his conceptions of reason and citizenship have no metaphysical priority but are instead discoverable in public culture, it is tempting to conclude that Rawls actually *attributes* these characteristics, which are themselves too broad to allow for empirical evaluation.<sup>213</sup> Certainly, both Rawls and Habermas make presuppositions, the universality of which would be impossible to establish empirically. In identifying a political sphere in which citizens define their own conceptions of justice, Rawls must still presuppose *as given* a conception of the person as reasonable and rational. Rawls insists that such a conception is political, not metaphysical, since all accounts of the moral nature of the person are left entirely alone as comprehensive doctrines. But could Rawls's own 'political' characterisation of the person not be regarded as such an account? Rawls's political liberalism is not neutral on the validity of comprehensive doctrines. In the *Law of Peoples* Rawls asserts that a comprehensive doctrine that contradicts public reason's commitment to reciprocity and attendant rights is itself fundamentally unreasonable.<sup>214</sup> Since Rawls insists that the values of public reason are 'complete' in the sense that "[they] alone give a reasonable answer to all, or nearly all... matters of basic justice",<sup>215</sup> the implication is that any

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<sup>213</sup> Bridges, T. 'Review: Political Liberalism by John Rawls (2): 'Rawlsian Reasonableness and the Creation of Citizens' in *Philosophy and Civic Culture: Inventing Postmodern Culture*, <http://www.civsoc.com/reviews/review1b.html>

<sup>214</sup> Rawls (1999a) *supra*, n.29, p.173

<sup>215</sup> *Ibid.*, p.145

remaining feeling of basic *injustice* flows from an invalid source. Similarly, Habermas's *a priori* presuppositions of communication must simply be accepted as the persisting (though partially buried) true access to the universal. As he himself concedes, the universal rules of reason cannot ultimately be derived or discovered and may even be counterfactual: we must accept that they are necessary for rational discourse.<sup>216</sup> For Habermas, the Post-metaphysical ideas of "self determination" and "self realization" are the "precipitate left behind" after the breakdown of metaphysics.<sup>217</sup> That is, despite the collapse of a belief in metaphysical explanations in modern society, unity of reason is still perceptible in the "plurality of its voices" and the "possibility in principle of passing from one language game to another."<sup>218</sup> By positing concepts such as the moral powers of the person and of rational communication as *essential*, Post-metaphysical liberalism is caught in a metaphysical trap that cannot be avoided by insisting that they are 'political' and 'unavoidable'. Moreover, if the presuppositions are indeed essential (as opposed to merely desirable in the context of western political society) then they must arise *a priori*, and that is the very basis of metaphysics. For, as Kant reminds us (and here he stands in as a useful critic of his Post-metaphysical descendents) while the empirical world is always vulnerable to doubt, the foundations of theory must not be. It seems, then, that rather than being 'Post' metaphysical, Rawls's and Habermas's notions of the *a priori* are actually 'Neo' metaphysical: a narrowing and a modernising of Kant's broader metaphysics rather than a radical departure.

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<sup>216</sup> Habermas (1996) *supra*, n.56, p.19

<sup>217</sup> *Ibid.*, p.99



## 6. Conclusion

This chapter has introduced some of the broad themes of liberal theory, and some of the significant characteristics of metaphysical and Post-metaphysical approaches to deriving moral and legal principles. Of particular concern to us has been the attempts made by liberal theorists to distinguish what they regard as matters of principle from matters of mere contingency. Matters that relate purely to benefit and detriment, historical and cultural particularism and consequentialism are all bracketed off from that which is universal, rational and essential. Classical conceptions of liberalism in which abstract notions arise metaphysically are contrasted to Post-metaphysical conceptions that attempt reinvigorate the universalist project for a pluralistic, modern audience. The chapter has discussed Rawls and Habermas and considered the success with which they avoid the unfashionable metaphysical presumptions of classical liberalism whilst nevertheless providing universally acceptable grounds for liberal principles. It has also examined some of the salient distinctions between Kantian and Hegelian approaches with regard to the universal/particular opposition and the significance of these distinctions for contemporary political debate. The chapter has identified Hegel's unification of abstract universal concepts and the particularities of participation in the ethical and public life of the state. Hegel is contrasted on this point with Kant's more formalistic account of morality and legitimate law as categorical imperatives

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<sup>218</sup> Habermas (1992) *supra*, n.64, p.117

that arise independently of all particularities in the empirical world. It has been noted that this difference of approach informs related differences between Rawls and Habermas in their theorisations of the relationship between rights and democracy, and also between Habermas's explicitly discursive theory as distinct from the abstraction of Rawls's early work on justice as fairness.

The next chapter shifts the discussion towards a more specifically legal problematic of liberal theory that will be significant in later chapters. Discussed first is the problem of what it means to take seriously Kant's dictum to treat a person as a 'means to an end' in a legal context. The chapter develops the notion of the end-in-itself in law in the context of the problem of justifying punishment and determining the degree of its severity as a matter of principle.



## Chapter 2

### Liberal Individualism as a Matter of Principle

#### 1. Introduction

The subordination of U.K law to the European Convention on Human Rights and the enactment of the Human Rights Act 1998 suggests that the broad liberal notion of the ‘individual’ has at least some normative significance in law. There are many who would argue that the moral foundation of Human Rights law is not to be found in Kant, while others argue that Human Rights has (or needs) no foundation at all. The purpose of this chapter is to outline the ways in which liberal universal principles translate into addressing some specific questions of modern law. This chapter therefore considers the translation of the Kantian imperative to treat humanity never merely as a means to an end but always also as an end-in-itself into legal principles on the value of human life and the justification of punishment.

#### 2. Humanity as an End in Itself and the Right to Life

##### 2.1 *‘Humanity’ as the Universal End of Mankind*

If, as Kant insists, acting morally requires us to pursue universal (rationally given) as opposed to merely particular (empirically discovered) ends, we must be able to

distinguish these two categories. This is an issue that has been the cause of much controversy.<sup>1</sup> Using the interpretation of Korsgaard, it can be argued that it is because the things we do are important simply by virtue of *our* regarding them so that we treat our own humanity as a value in itself. Since this attitude can be conceived as applying to all rational people, humanity itself is the only *universal* end. It is from this insight that, for Korsgaard, arises the imperative to always treat humanity as an end in itself.<sup>2</sup> Korsgaard writes: “Having humanity as an end is not an incentive for adopting the moral law; rather, the moral law commands that

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<sup>1</sup> Schopenhauer, A. *On the Basis of Morality*, Payne, E.F.J. (trans.), Richard Taylor (introduction) (Indianapolis: Bobbs-Merrill, 1965) pp.96-7: Schopenhauer argues that the categorical imperative does not establish any moral system at all, but is rather an egoistic reminder to refrain from doing to others that which you would not have them do to you. Singer, M.G. *Generalization in Ethics*, (London: Eyre & Spottiswoode, 1963) argues similarly that the categorical imperative is merely a disguised consequentialism, suggesting that Kant provides no theory of universal morality at all. Broad, C. D. *Five Types of Ethical Theory*, (London: Routledge and Kegan Paul, 1944) pp.127-8 argues that if people do happen to agree that certain principles are categorical imperatives, it is because they all recognise a universal *good* in their particular content, rather than in their ageless form.

<sup>2</sup> Korsgaard, C. M. ‘Introduction’ in Kant *Groundwork of the Metaphysics of Morals*, Gregor, M. (ed.) Intro. Korsgaard, C.M. (Cambridge: Cambridge University Press, 1998) p.xxii; Kant regards ‘humanity’ as synonymous with the collection of concepts that distinguishes human life as such. ‘Humanity’ thus signifies the universal moral community of rational persons capable of morality, and is thus accorded ‘dignity’ and respect as an end in itself rather than being exchangeable for a ‘price’. See Kant, *ibid*, s. 4:429, 4:435: “...morality, and humanity insofar as it is capable of morality, is that which alone has dignity.”



humanity be treated as an end.”<sup>3</sup> Humanity is the only rational end because only rational human beings have the power to set their *own* ends. Respecting a person’s humanity, then, means allowing others to exercise their freedom of will rather than trying to manipulate them or bend their will to our own purposes.<sup>4</sup> Other people deserve respect because they have the freedom to decide their own purposes. Kant therefore in fact presents us with a theory of humanity that provides the prescriptive teleology. Guyer takes a similar view. Freedom – the ability to choose one’s own maxims for action – is the overriding value and the foundation of Kant’s laws of reason.<sup>5</sup> For Korsgaard and Galstone, this focus upon humanity as the maker of its own ends is enough to convince one that, far from being empty and formalistic, Kant provides us with a teleological conception of humanity and thus a focus for moral duty. The teleology (or purpose) of humanity is the fulfilment of its potential and realisation of chosen ends.<sup>6</sup> Assuming, then, that the universal end of mankind is humanity, the next question is: what does it mean, in practical terms, to treat a person as an ‘end in itself’?

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<sup>3</sup> Korsgaard, C.M. *Creating the Kingdom of Ends*, (Cambridge University Press, 1996) p.109, 114

<sup>4</sup> Korsgaard, C. M. ‘Introduction’ in Kant (1998) *supra*, n.2, p.xxiii. See also Beyleveld, D. and Brownsword, R. *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001) where Brownsword argues (p.159) that the command to never treat another merely as a means to an end demands that we respect other peoples’ autonomy.

<sup>5</sup> Guyer, P. *Kant on Freedom, Law and Happiness* (Cambridge: Cambridge University Press, 2000) pp.240-1

<sup>6</sup> Galstone, W.A. ‘What is Living and What is Dead in Kant’s Practical Philosophy?’ in Beiner, R. and Booth, W.J. *Kant and Political Philosophy: The Contemporary Legacy* (Yale University Press, 1993) pp. 207-223, pp. 216-7

## 2.2 What does it mean to Treat Humanity as an End in Itself?

Interpretations of Kant have produced a wealth of suggestions as to what it means to treat human life as an end in itself, reflecting a diversity of ideas regarding the extent of one person's duty to another. The conservative interpretation considers that, as rational beings, persons can look after themselves, and respecting them involves simply a negative duty to not interfere with or inhibit them.<sup>7</sup> However it is possible that the imperative requires a positive duty of assistance and a more flexible conception of the person. O'Neill argues that a Kantian 'person' is not a pure abstraction of rationality but instead must be taken as a flesh and blood<sup>8</sup> being who necessarily requires assistance in realising their own ends. Therefore to treat someone as an end we owe them a duty both in the negative sense of respecting their individuality and also in the positive sense of giving assistance when required. O'Neill draws on Kant's comments on providing assistance to others<sup>9</sup> to argue that

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<sup>7</sup> This would be a reasonable interpretation of the doctrine of Right, in which Kant states that one's external duty in exercising one's capacity for free will is simply not to interfere with the freedom of anyone else (Kant *The Metaphysics of Morals*, (Cambridge: Cambridge University Press, 1991) p.56). See Chapter One, s. 2.1., *infra*.

<sup>8</sup> O'Neill, O. *Constructions of Reason: Explorations of Kant's Practical Philosophy*, (Cambridge: Cambridge University Press, 1995) pp.115-6

<sup>9</sup> Kant (1998) *supra*, n.2 at p.39/ s. 4:430 – Each person should try “as far as he can, to further the ends of others. For, the ends of a subject who is an end in itself must as far as possible also be *my* ends.”



treating humanity as an end-in-itself is not merely a negative duty. The morally less-developed make demands on our moral regard just as the ideal rational agent does, and we owe a duty to address such people to their own level of understanding and thus respect their “particular capacities for agency”.<sup>10</sup> The duty to give assistance is thus a categorical imperative and to wilfully withhold it is contrary to the imperative to respect humanity. Guyer reads the Kantian requirement of treating a person in this way in conjunction with Rawls’s notion that liberty must be secured for all.<sup>11</sup> He argues that despite explicitly rejecting the notion that the state should promote its citizens’ happiness, Kant’s imperative can be interpreted along Rawlsian welfarist lines. Any state infringement of freedom must be acceptable to all – including the least well-off. In importing the language of Rawls’s second principle of justice, Guyer, like O’Neill, provides some much-needed substantive content to Kant’s theory.

Kant’s own writings are conspicuously vague as to what is actually required in order to treat others with the appropriate respect.<sup>12</sup> There is an indication that his conception of the person is not merely a cold, ideal standard of rationality. He admits that desires and the pursuit of happiness<sup>13</sup> play a large part in the human will and also in achieving one’s ends, and even a rational person requires the help of

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<sup>10</sup> O’Neill (1995) *supra*, n.8, p. 115

<sup>11</sup> See Guyer (2000) *supra*, n.5, pp. 274-5.

<sup>12</sup> Skorupski, J. ‘Ethics’ in Bunnin, N. and Tsui-James, E.P. (ed.) *The Blackwell Companion to Philosophy* (Oxford: Blackwell, 1996) pp.198 – 228, p. 217

<sup>13</sup> Kant, *Critique of Practical Reason*, Abbot, T.K. (trans.) (Amherst, N.Y.: Prometheus Books, 1996) p.114-5

others.<sup>14</sup> However, Kant refers to ends-in-themselves as rational beings; that is, beings who are at least capable of moral freedom and hence moral worth. In the *Groundwork*, Kant posits the Kingdom of Ends as an ideal state in which reciprocal regard between “rational beings” is universal, governed by “common objective laws”.<sup>15</sup> Those who would qualify to exist in this kingdom are ends-in-themselves, but Kant is explicit that the kingdom of ends is made up only of “rational beings”;<sup>16</sup> it is necessarily a community of moral agents whose wills are motivated by the moral law. Kant’s test for whether a maxim is properly universalisable is that it must harmonise with the principle of a Kingdom of Ends.<sup>17</sup> And since this kingdom contains only rational beings, it seems that the process of universalising a maxim need only be compatible with rational people. In other words, only those who would meet the criteria for the Kingdom of Ends are considered as part of the moral universe. In the real world however, such moral capacity cannot be assumed. Rather, it can only be known empirically. O’Neill’s elastic interpretation goes some way to meeting the criticisms of Kant’s formalism, but a problem remains as to the fate of those with no capacity for practical reason at all. Taking incapacity into account, not everyone in the real world would qualify for a place in the Kingdom of Ends on the basis that they themselves fail to meet the requirement of reciprocity. It could be argued further that the condition of reciprocity itself prevents the

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<sup>14</sup> Kant, I. *Groundwork of the Metaphysics of Morals* (London: Routledge, 1995) pp.85-6

<sup>15</sup> Kant (1998) *supra*, n.2, p.41/ s.4:433

<sup>16</sup> *Ibid.*, p.41/s. 4:433, p.43/ s.4:436

<sup>17</sup> *Ibid.*, s.4:436



incapable from being treated as an end-in-itself, since a person's claim to respect is conditional upon their capacity to give this respect in return.<sup>18</sup>

### 2.3 *The End-in-Itself in Law: Human Rights and the Doctrine of Double Effect*

A system of respect for each individual as an end-in-itself establishes an ideal of a symmetrical moral community institutionalised in human rights discourse in law. The echoes of Kant's moral imperative in Article 1 of the United Nation's Universal Declaration of Human Rights 1948 ring loud indeed: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>19</sup> In this sentence the Declaration incorporates the notions of universality, autonomy and persons as rational and as ends in themselves. In such a spirit, article 3 follows quite naturally: "Everyone has the right to life, liberty and security of person."<sup>20</sup> The European Convention of Human Rights, committed to the "universal and effective recognition"<sup>21</sup> of the rights listed in the Declaration states (in article 2) that "[e]veryone's right to life shall be protected by law".<sup>22</sup> But as a statement of principle, such a pronouncement is not significantly clearer than the Kantian

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<sup>18</sup> *Ibid.* See also Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999) p.447

<sup>19</sup> See Steiner, H.J. and Alston, P. *International Human Rights in Context* (Oxford: Oxford University Press, 1996) p. 1156

<sup>20</sup> *Ibid.*, p.1157

<sup>21</sup> *Ibid.*, p.1191

<sup>22</sup> *Ibid.*

imperative. If treating a person as an end-in-itself in law entails protecting their right to life then there still arises the problem as to whether this is merely a negative duty, or whether it also includes a positive duty to assist.<sup>23</sup> A question might also be raised as to what ought to happen when, say, two lives are incompatible.<sup>24</sup> The ECHR itself provides some assistance in article 2(2) when it states: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence...” What is unclear from the text is the moral status of the person who is killed when ‘absolutely necessary’: Is the right to life suspended, or justifiably infringed? In Kantian language, the problem is one of whether such a killing is justified by a selective application of the categorical imperative or the imperative allows for differential treatment. The only assistance that Kant appears to provide in thinking about exceptions to this negative duty, is his assertion that coercion of another person is only justified when it is used to promote freedom and equality itself.<sup>25</sup>

Another way to conceive the problem of permissibly bringing about a person’s death when ‘absolutely necessary’ is through morally distinguishing the intended,

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<sup>23</sup> Conflicting judgments have been reached by the ECtHR on this point. See *McCann v U.K.* (1996) 21 EHRR 97 contra *Paton v U.K.* (1980) 3 EHRR 408

<sup>24</sup> For example, in the case of *Re A (Conjoined Twins, Medical Treatment)* [2000] 4 All ER 961, examined in Chapter Three, *infra*.

<sup>25</sup> Kant, ‘On the Common Saying: ‘That May be True in Theory, but it does not Apply in Practise’ in Reiss, H. (ed.) *Kant: Political Writings* (Cambridge: Cambridge University Press, 1995) pp. 73-6. See also Guyer (2000) *supra*, n.5, p.276



from merely foreseen effects of one's actions. The unfortunate circumstance may arise, for instance, that in striving towards some perfectly good or necessary end, we endanger a person's life. Thomas Aquinas's justification of self defence rests upon a moral act having *two effects*: since my intended effect is to save my own life, the foreseen side-effect of causing the death of my assailant (if necessary) is not unlawful.<sup>26</sup> A difficulty with this idea – the doctrine of Double Effect – is the moral significance of the distinction between intended and foreseen harm. Without further constraints upon its use,<sup>27</sup> there seems to be an implication that harm may be committed with impunity as long as the actor does not directly intend that harm.<sup>28</sup> A further difficulty is that of distinguishing between that which is intended and that which is foreseen. That injury may not be inflicted intentionally is clear enough on Kantian moral grounds, but stipulating when a merely foreseen injury is to be permitted, is far from obvious. Clearly, if the doctrine is to safeguard against using other people as mere means to our own ends then we cannot characterise as a mere 'side effect' the death of A when that death is brought about as a means of saving B

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<sup>26</sup> Aquinas, T. *Summa Theologica* II-II, question 64, art. 7, 'Of Killing' in Baumgarth, W.P. and Regan, R.J. *On Law, Morality and Politics*, (Indianapolis: Hackett, 1988) p.226

<sup>27</sup> For example, the requirement of proportionality, outlined by Beauchamp, T.L., that "the good effect must outweigh the bad effect" in *Principles of Biomedical Ethics* (New York, N.Y. and Oxford: Oxford University Press, 2001) p.207. Also, the infliction of foreseen harm must be the only available course of action open to the actor – see Lichtenberg, J. 'War, Innocence, and the Doctrine of Double Effect' *Philosophical Studies* 74 (1994) pp. 347-68, p.355

<sup>28</sup> Williams, G. *The Sanctity of Life and the Criminal Law* (London: Faber & Faber, 1958) p.286

as this is an instrumental killing and thus intended<sup>29</sup>. It seems that, for an injury to be permitted by Double Effect it must be neither end nor means to an end: a good end may not be achieved using a bad means<sup>30</sup>. In law, recent House of Lords decisions on intention for murder seems to further limit the doctrine's possible scope by including as 'intended' death or serious injury that was foreseen as "for all practical purposes inevitable".<sup>31</sup>

### **3. The Criminal as an End-in-Itself: The Principled Justification of Punishment**

There are many legal applications of Kantian liberalism other than the right to life that could be examined, especially since the Human Rights Act 1998. The particular strand picked up here is the treatment of persons judged to have transgressed the law. Hence, this section considers the question of justifying punishment from the principled bases discussed so far. The purpose here is to identify how the liberal notions of the End-in-Itself and rational autonomy can be understood to give rise to theories of punishment that assume as their moral basis the liberal notion of the person as a rational agent. As above, this chapter shall examine also how modern and contemporary formulations struggle with the

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<sup>29</sup> McIntyre, A. 'Doing Away With Double Effect' *Ethics* (2001) Vol.111, No.2 pp. 219-255, p.

249. For this reason, McIntyre argues that Aquinas's justification of Self Defence is not, in fact, an illustration of Double Effect.

<sup>30</sup> *Ibid.*, p. 229

<sup>31</sup> See *R v Woollin* [1999] 1 AC 82, p. 96



problem of classical liberal metaphysics in giving an account of why and how punishment is justified.

### 3.1 *The Resurgence of Retributivism*

Largely abandoned in favour of rehabilitative and welfarist justifications of punishment through much of the Twentieth Century, retributivism has staged something of a resurgence in recent years, due at least in part to a growing perception that the criminal justice system is ineffective in deterring or reforming criminals or preventing crime.<sup>32</sup> Although there is no single theory of retributivism as such, certain common elements may be identified which are here traced back to the canonical texts of Kant and Hegel. From a liberal perspective, retributivism can be said to represent the only ‘principled’ justification of punishment because unlike utilitarian justifications, it is founded on the idea that punishment is in itself a rightful response to an offender who we can regard as having been responsible for a crime.<sup>33</sup> The resulting justification for punishment is simply that a criminal wrong has been committed, and that that person responsible for it should suffer a

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<sup>32</sup> See Duff, R.A. *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001) p.7

<sup>33</sup> Opinion is divided however as to the precise nature of ‘responsibility’ and its relationship to other moral philosophical concepts such as voluntariness, freewill and constraint – and also to criminal law concepts of intention and recklessness.

proportional degree of ‘pain’.<sup>34</sup> Utilitarians have responded by claiming that retribution is a polite word for base and barbarous revenge which, inflicting gratuitous suffering, cannot be a good in itself.<sup>35</sup> For utilitarians punishment is only good if its consequences are good: e.g. the offender is reformed or others are deterred from offending. It is true that retributivists disagree as to why exactly a criminal wrong requires punishment. Reasons for punishing considered here are firstly the classical liberals’ restoration of the metaphysical moral order, secondly the positivist legal requirement that only the guilty are punished, and thirdly the communication of public censure. It is argued here that in all its forms, retributivist theorisations fall short of providing a purely principled justification. Such shortcomings mean that, when confronted with the task of considering a proportional criminal sentence, consequentialist factors are not easily separated from deontological ones. As shall be seen in the next section, this characteristic of retributive theory, conceded by many modern retributivists, is crucial in understanding judicial strategies for deciding how much punishment is deserved.

### 3.2 *Classical Liberal Retributivism*

Kant’s theory of just punishment follows from his liberal principle of Right – that it is a categorical imperative to exercise one’s own freedom only to the extent that it

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<sup>34</sup> See Williams, B. ‘Moral Responsibility and Political Freedom’, (1997) 56 (1) *Cam LJ* pp. 96-102

<sup>35</sup> Rashdall, H. *The Theory of Good and Evil (Vol 1)* (Oxford: Oxford University Press, 1924) p. 284, p. 304



does not interfere with the freedom of others.<sup>36</sup> Having unjustly interfered with the freedom of another, the offender must be punished in order to restore the metaphysical and universal rule of reason. Since punishment so conceived is not aimed at achieving any other purpose, the wrong should be regarded as being righted through punishment in a conceptual rather than empirical way.<sup>37</sup> Like Kant, Hegel regards punishment as retribution not only as a state's right but also its duty in order to redress the injury to reason caused by a wrong. Hegel is explicit in his rejection of deterrence, reform, protection and other such purposes as justifications for meting out punishment.<sup>38</sup> For Hegel, a 'wrong' is a coercion of another's will, and since the will finds its existence in freedom the wrong threatens the will's very existence.<sup>39</sup> It therefore cannot be in harmony with reason and so cannot be allowed to continue to exist.<sup>40</sup> For Hegel, "coercion immediately destroys itself in its concept, since it is the expression of a will which cancels the expression or existence of a will."<sup>41</sup> Hence an act motivated by a criminal will "brings its own retribution with it".<sup>42</sup> In punishing simply because the individual is held to have been responsible for a crime, retributive punishment refuses, as a matter of

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<sup>36</sup> Kant (1991) *supra*, n.7, p. 56

<sup>37</sup> Norrie, A.W. *Law, Ideology and Punishment: Retrieval and Critique of the Liberal Ideal of Criminal Justice* (Dordrecht and London: Kluwer Academic Publishers, 1991) pp. 51-4

<sup>38</sup> Hegel, *The Hegel Reader*, Stephen Houlgate (ed.) (Oxford: Blackwell, 1998) p. 125/s.99

<sup>39</sup> *Ibid.*, p. 123/s. 96

<sup>40</sup> *Ibid.*, p. 123/s. 97

<sup>41</sup> *Ibid.*, p. 120/s. 92

<sup>42</sup> *Ibid.*, p 129/s. 101

principle, to use an individual as a means to a crime-preventative or reformatory end. For Hegel, since the criminal will is a self-destructive one, the criminal brings his punishment upon himself. Committing a wrong temporarily divorces the criminal from Right and hence reason and punishment reunites him, reconciling his will with reason and thus the criminal is honoured as rational. The tears that Dostoyevsky's Raskalnikov sheds when he gives himself up for arrest are not tears of despair, but relief.<sup>43</sup> However, Kant and Hegel are both unable to find a metaphysical a priori principle for deciding the right amount of punishment, except that it should bear some kind of equivalence with the wrong inflicted. Hegel admits that decisions in this respect are socially and historically contingent<sup>44</sup> and "will always be arbitrary".<sup>45</sup> This is an embarrassing retreat for metaphysical retributivism after such confident statements as to the justification of punishment in general and suggests that supposedly external consequentialist considerations are required as a supplement.

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<sup>43</sup> Dostoyevsky, F. *Crime and Punishment*, McDuff, D. (trans.) (London: Penguin Classics, 1991).

Dostoyevsky brilliantly evokes this reconciliation (p.602): "He had suddenly recalled Sonia's words, 'Go up to the cross roads, bow to the people, kiss the earth, for you have sinned against it too, and say to the whole world out aloud, 'I am a murderer!'" In remembering them, he had begun to tremble all over. And such a crushing weight did he now carry from the hopeless despair and anxiety of all this recent time, and especially of the last few hours, that he fairly leapt at the chance of this pure, new, complete sensation. It suddenly hit him like an epileptic seizure: a single spark began to glow within his soul, and suddenly it engulfed everything, like fire. Everything in him instantly grew soft and the tears came spurting out. He fell to the ground where he stood. . . ."

<sup>44</sup> Hegel (1998) *supra*, n.38 at p 251/s 218

<sup>45</sup> *Ibid.*, p. 246/s 214



### 3.3 *Twentieth and Twenty-First Century Retributivism*

#### 3.3.1 The Separation of Morality and Law

Self-consciously unfashionable, theorists of the sixties and seventies attempt to uphold the notion that punishment of the guilty is right in itself, but retreat from moral metaphysics under fire from utilitarians. Hawkins finds that Kant's notion of equivalence does not provide a first principle of the right amount of punishment, and that Hegel's idea of punishment as negating a wrong without either reforming the criminal or reversing the evil committed is simply incomprehensible.<sup>46</sup>

Mabbot's defence of retributivism agrees with Kant and Hegel that a criminal brings the punishment on himself, but renders it purely a legal, rather than a moral justification of punishment.<sup>47</sup> Mabbot's distinctly legal notion of retributivism is aimed at ensuring that, as a justification, it cannot be accused of promoting an offender's 'better side' (and thus of embracing any elements of consequentialism), and by shifting the discussion from morality to legal definition it addresses the accusation of barbarism. The problem with Mabbot's retributivism is that his argument seems to be little more than a description rather than a justification of

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<sup>46</sup> Hawkins, D. J. B. "Punishment and Moral Responsibility" in Grupp, E. (ed.) *Theories of Punishment* (Bloomington, London: Indiana University Press, 1971) pp. 13-18, p.16

<sup>47</sup> Mabbot, J.D. "Punishment" in Acton, H.B. *The Philosophy of Punishment: A Collection of Papers* (London: Macmillan, 1969) p. 41

punishment.<sup>48</sup> Mabbot offers no compelling reason why criminal desert is sufficient justification for punishment, apart from the fact that a person is responsible for the crime they commit and punishment is a “corollary... of law-breaking”.<sup>49</sup> As Mundle points out, moral and legal justifications are surely two separate questions: punishing a person for breaking an unjust law may in itself be lawful, but it cannot be morally justified.<sup>50</sup>

This separation of morality and law has far-reaching problems if we want to provide a principled justification of punishment. The difficulty is emphasised by Hart and Rawls. Despite agreeing that each individual instance of punishment is justly inflicted simply because the individual has broken a law (judicial sentencing), they contend that the *general* justification for punishing people at all is utilitarian (legislation).<sup>51</sup> Hart asserts firstly the retributivist claim that “when breach of the law involves moral guilt the application to the offender of the pain of punishment is itself a thing of value”<sup>52</sup> before conceding that this can only succeed if limited to specific cases as opposed to the ‘General Justifying Aim’ of punishment. He argues that distinguishing these two concepts avoids the “shadow-fighting” between utilitarians and retributivists: each is given its own sphere of operation.<sup>53</sup> It seems

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<sup>48</sup> Norrie (1991) *supra*, n.37, p. 131

<sup>49</sup> Mabbot, in Acton (1969) *supra*, n.47, p. 49

<sup>50</sup> Mundle, C. W. K. “Punishment and Desert” in Grupp (1971) *supra*, n.46, pp. 71-2

<sup>51</sup> Hart, H. L. A. *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1978); Rawls, J. ‘Two Concepts of Rules’ in Acton, *supra*, n.47, pp. 108-9

<sup>52</sup> Hart, *supra*, n.51, p 8

<sup>53</sup> *Ibid.*, p. 9



as if, for these theorists, retributivism has retreated even further from being a moral justification for punishment. If Hart is correct that retributivists must give ground on the general justification of punishment it is difficult to regard ‘just punishment’ as a purely de-ontological principle, in the sense that classical liberal theory attempts to derive. To concede, as Rawls and Hart do, that the overarching justification for punishment is utilitarian, renders the remaining rationale for retributivism – that only the guilty are punished – a banal truism. Retaining the classical liberal notion of individual responsibility without its metaphysics, reduces retributivism to something like a positivistic description of why X rather than Y is punished but provides little as regards moral justification.

### 3.3.2 Morality and Law Reunited

Within the latest re-conceptions of justified punishment is a reintroduction of an underlying moral metaphysics in the attempt to reinstate retributivism, not simply as ensuring that only the guilty are punished, but as a general justifying discourse. ‘Communicative’ conceptions of retributivism, for which Kant is cited as a distant forefather, are grounded in the imperative that the offender be respected as a rational agent.<sup>54</sup> Punishment as an infliction of ‘pain’ in response to a crime represents the communication of a censure that society owes to everyone whom it

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<sup>54</sup> Duff, A. and Hirsch, A. von. ‘Responsibility, Retribution and the ‘Voluntary’: A Response to Williams’ (1997) 56 (1) *Cam LJ* pp.103-113, p. 112

recognises as free to be guided by good (lawful) and bad (unlawful) reasons.<sup>55</sup> This is an explicitly moral form of retributivism, inasmuch as both Duff and von Hirsch state that this censure is an extension of the moral blame and criticism that we would direct at anyone who knowingly transgressed society's norms. However, it is perhaps a sign of retributivism's continuing inadequacy to provide a full justification that Duff and von Hirsch find it necessary to incorporate consequentialist considerations. For instance, both theorists direct their retributivism towards effecting the repentance and self-reform of the criminal.<sup>56</sup> In Duff's case, there is a concerted effort to find a theory of punishment that can counter what he regards to be the vengeful rhetoric of 'law and order'. Duff's concern for the self-reform of the criminal is grounded in his insistence that, whilst the justification of punishment is chiefly retrospective, it also serves the purpose of re-integrating the criminal with the community from which his wrongdoing has cut himself off.<sup>57</sup> Duff argues further that criminal sentences should be proportional to the amount of time we would reasonably consider necessary to make a rational agent repent their actions.<sup>58</sup> Of course, reference to a community's values and a prisoner's reform and repentance risks offending against the liberal imperatives that the individual is not sacrificed to another cause, or treated merely as a means to an end. Careful not to

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<sup>55</sup> *Ibid.*, pp. 110-11

<sup>56</sup> See Duff, R. A. 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 *Crime & Justice* 1-97, pp. 41-5

<sup>57</sup> Duff (2001) *supra*, n.32, pp. 40-1

<sup>58</sup> Duff, R. A. 'Punishment, Communication and Community' in Matravers, M. *Punishment and Political Theory* (Oxford and Portland, Oregon: Hart Publishing, 1999) pp. 48-68, p. 52



allow his communitarianism to undermine his liberalism, Duff insists that, conceived as a shared commitment to individual autonomy, privacy, freedom and diversity, community values enable punishment to be conceived as restoring the criminal to society whilst not sacrificing his individualism.<sup>59</sup> On this view a crime is a public wrong in the sense that the ‘community’ rightfully takes an interest in it by issuing a condemnation through criminal sentencing.<sup>60</sup> Furthermore, although communicative retributivism is aimed at bringing about reform, retrospective considerations of blameworthiness remain the primary concern. For instance, Duff states that only those responsible for committing serious criminal wrongs are punished.<sup>61</sup> Moreover, Andrew von Hirsch insists that sentences cannot be contingent upon a criminal’s particular resistance to or acceptance of reform.<sup>62</sup> Hence, the reformatory aim is coupled with the retributivist justification.<sup>63</sup> On justifying the punishment of juveniles, Weijers also mobilises an idea of community in this way by adopting the Hegelian idea that, in order that one is not eternally cut off from the social world, “it is better to be punished if you commit a

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<sup>59</sup> *Ibid.*, p. 47

<sup>60</sup> *Ibid.*, p. 61

<sup>61</sup> Duff in Matravers (1999) *supra*, n.58, pp. 48-86, pp. 58-9

<sup>62</sup> Hirsch, A. von. ‘Punishment, Penance and the State: A Reply to Duff’ in Matravers (1999) *supra*, n.58, pp. 69-82, p. 80

<sup>63</sup> *Ibid.*, p. 39

crime than not”.<sup>64</sup> However, if the communication of censure issues from the community, and the communication itself is an effort to bring the criminal to understand and accept the moral failing of his act, the success of the process seems to rest upon a relativism: depending upon the community’s moral compass and the criminal’s supposed connection with the community that he has cut himself off from. For Matravers (who regards moral consensus to have given way to a fractured, diverse modern society), such a perspective loses “genuine critical engagement” with the problem of justifying punishment, and stands in need of further consideration of the content and moral status of the message communicated.<sup>65</sup>

As abstract theories, none of the conceptions of retributivism considered here provide a full justification for punishment purified of utilitarian consideration of consequences. Maintaining a focus on this problem, the analysis of the legal cases given below seeks to locate retributivism within the wider context of the rhetoric of legal judgment. It is this linguistic context that provides an insight as to the way in which consequentialist considerations supplement retributivism in justifying punishment.

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<sup>64</sup> Weijers, I. ‘The Moral Dialogue: A Pedagogical Perspective on Juvenile Justice’ in Weijers and Duff (ed.) *Punishing Juveniles: Principle and Critique* (Oxford: Hart Publishing, 2002) p. 143.

We shall consider theories of juvenile punishment in more depth later.

<sup>65</sup> Matravers, M. ‘ “What to Say?”: The Communicative Element in Punishment and Moral Theory’ in Matravers (1999) *supra*, n.58, p. 108-123



#### 4. Liberalism, Politics and Judgment: The Uses of Philosophy

At this point it would perhaps be wise to address the possible objection that the focus so far maintained upon the theories of liberal principle as opposed to other influences upon legal judgment is a narrow and abstract approach to critique. At least it may be suggested, as Garland does, that philosophical critiques of aspects of law are potentially less fruitful and interesting than sociological ones. In his work on the criminal justice system, Garland stresses the importance of historical and sociological analysis in accounting for contemporary legal trends and policies.<sup>66</sup> He notes that, being a “social institution”,<sup>67</sup> the criminal justice system is more profitably studied in terms of its “role in social life”.<sup>68</sup> For Garland, moral philosophical perspectives without sociology are “misdirected” since the normative claims can only be made persuasively by referring to how a system actually operates.<sup>69</sup> In answer to such criticisms, I would like to make clear the role that I see for the philosophical perspectives discussed. Garland’s comments on philosophical perspectives should be understood as a dismissal, not of all recourse to philosophy, but rather of dogmatic mobilisations of particular philosophical

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<sup>66</sup> Garland, D. *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: University of Chicago Press and Oxford University Press, 2001) p. 13. See also Ryan, M. *Penal Policy and Political Culture in England and Wales* (Winchester: Waterside Press, 2003)

<sup>67</sup> Garland, D. *Punishment and Modern Society: A Study in Social Theory* (Oxford: Clarendon Press, 1990) p. 9

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

propositions in making an argument. I would agree with Garland that attempts to mount a critique of the law from the perspective of, say, the categorical imperative, original position or ideal speech community carry limited scholarly weight.<sup>70</sup> Indeed, such an approach would be uncritical and unimaginative since it would involve a simplistic adoption of liberal theoretical premises in order to draw conclusions. Conclusions arrived at by simply adopting the logic of a given theoretical system are interesting or useful only as a way of providing a set of initial perspectives in a larger study. My interest in liberal theory (as will be seen in later chapters) lies in critically examining the implications of these perspectives through deconstruction, a theoretical form that is itself subjected to scrutiny in later chapters.<sup>71</sup> Of course, this is not to suggest that this thesis is any more free from metaphysical premises than the theorists that it examines. What is being emphasised here is that liberal theory forms an object of critique as much as the legal judgments that are introduced in Chapter Three.

For Kant, if it cannot be assumed that individuals whom we judge are not morally autonomous then it is not possible to meaningfully hold them accountable to the moral law. In order for a person to be held accountable for their actions they

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<sup>70</sup> My approach, then, is distinguished from that of William Rehg, quoted approvingly by Habermas as providing a means of deriving the dialogical universal principle in order to criticise empirical law from an idealised view of the liberal democratic nature of just legal system. See Rehg, W. (1991) 'Discourse and the Moral Point of View: Deriving a Dialogical Principle of Universalisation' in *Inquiry* 34 pp. 27-48; quoted in Habermas *Justification and Application* (Cambridge: Polity Press, 1993) p.32.

<sup>71</sup> See particularly Chapter Six, *infra*.



must have the requisite autonomy to have been able to make a proper decision. This study focuses upon the decisions of courts comprised of judges in whom it would be unwise to assume this autonomy. Kennedy describes the view of judges as objectively applying legislative rules to given facts as “implausible”.<sup>72</sup> He points out that judges often do have to create new rules and in doing so political judgments necessarily guide judicial reasoning. As individuals it may be possible for us to regard them in the way that Kant thinks of morally autonomous persons: they have the mental and moral capacity to consider their judgments in the light of universal observance. However, in the contexts in which their decisions are examined in this thesis – ‘ethical dilemmas’ in the sense that fundamental liberal principles clash or are obscure – there are moral and practical constraints that renders such an assumption unsafe. As other critics have noted, judicial decision-making necessarily imposes such constraints upon moral autonomy, e.g. in requirement to consider precedents and future cases which may itself cite a present judgment as precedent, other ethical considerations and particular political purposes. Ackerman’s thesis is that the policies that judges adopt as regards deference to legislation and their level of activism and reformism will depend upon their own ‘comprehensive view’ of what a just decision should be like.<sup>73</sup> He identifies utilitarianism and Kantianism as plausible examples of such views and he

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<sup>72</sup>Kennedy, D. *A Critique of Adjudication* (Cambridge, Mass.: Harvard University Press, 1998)

p.27-8

<sup>73</sup> Ackerman, B. *Private Property and the Constitution* (New Haven, Conn.: Yale University Press, 1977) p.42

suggests that a “typical contemporary judge” probably uses a mixture of these.<sup>74</sup> If ‘objectivity’ is to be understood in its Kantian sense of orientation by a morally autonomous agent towards universal observance, then judges cannot be assumed to be autonomous, and nor their judgements objective.

My own view tries not to make any definite assumptions as to the moral or political powers or bias of judges. What I want to show is that engagement with philosophical ideas can provide an illuminating study of the rhetoric of legal judgment encompassing as it does principled and practical elements. As Garland admits, whether an understanding of legal practices is gained through sociology or philosophy, it is always ‘political’ in the sense that it requires interpretation in the light of certain other practices and norms – whether legal, social or moral. The thesis aims to examine the difficulties experienced in law (and the rhetorical strategies of resolving these difficulties) in mobilising the universalist, rational aspirations of that are inherited from Kant’s legal and political thought. In the case of Rawls and Habermas, the thesis examines how the detachment of these aspirations from Kant’s metaphysics contributes towards judicial strategies in interpreting incompatible or obscure liberal principles.

## 5. Conclusion

This chapter has attempted to give an account of the way in which liberal moral theory provides grounding for questions of justification in law. Considered first was

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<sup>74</sup> *Ibid.*, p.76



the practical application of Kant's notion of an End in Itself as a foundation for the right to life. It examined the difficulty presented for legal interpretation by the abstract Kantian imperative to treat humanity as an end in itself and the work of commentators such as Korsgaard, O'Neil and Brownsword in this regard. The chapter examined article 2 of the ECHR as an embodiment of the Kantian duty to respect each person's life, and discussed the problem of conflicting lives. Secondly, the chapter has considered theories of principled justification of punishment premised on the idea of the person as an End in Itself. Respect for the individual as a rational agent means holding them responsible for their actions, and hence punishment may be regarded as matter of retributive principle. The problem, persisting in retributive theory, of maintaining that such a principled justification of punishment can make sense independently of utilitarian or consequentialist factors, was discussed. The conclusion of this section noted that in all its formulations, retributivist justifications of punishment imply a good consequence in the criminal's reform. The next stage is to introduce the legal judgments of the English appellate courts that will constitute the legal focus of later chapters.

## Chapter 3

### Judicial Case Studies as a Scene for the Universal Viewpoint

#### 1. Introduction

This chapter provides an account of the legal judgments that provide the empirical case-study for the question of the role of liberal principle in law. The cases involve certain principles of sentencing and criminal law, to which a critical eye is turned in following chapters. The chain of appeals by Myra Hindley against the Home Office imposition of her whole life tariff in the Court of Appeal<sup>1</sup> and House of Lords<sup>2</sup> and also the judgments on the Bulger killers, Robert Thompson and Jon Venables concerning their release<sup>3</sup> and Tariff<sup>4</sup> pose the problem of the justification of punishment as a matter of principle. *Re A (Conjoined Twins: Medical Treatment)*<sup>5</sup> is a rather different kind of case, and our interest in it lies in its discussion of the meaning and scope of the right to life. In outlining the pertinent details of these cases, this chapter is intended to indicate the main points of contention for critical analysis in the next chapter. This chapter does not attempt to provide a

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<sup>1</sup> *R v. Secretary of State For the Home Department, ex parte Hindley* [2000] QB 152

<sup>2</sup> *R v. Secretary of State For the Home Department, ex parte Hindley* [2000] 2 All ER 385

<sup>3</sup> *Re Thompson and Another (Tariff Recommendations)* [2001] 1 All ER 737

<sup>4</sup> *R v. Secretary of State For the Home Department, ex parte Thompson* [1998] AC 407; [1997] 3 All ER 97 (HL)

<sup>5</sup> [2000] 4 All ER 961



comprehensive set of case notes. Nor does it give a general introduction to the law of criminal sentencing or the right to life. Rather, our interest in the case law lies in simply outlining certain problematics for our study of liberal principle in law. For reasons that the next chapter attempts to make clear, these cases show us something of the logical limitations of liberal critical approaches to law and are hence valuable sources for modern legal theory.

## 2. Murder: The Punishment of Adults and Children

### 2.1 *A 'Uniquely Evil' Woman: Myra Hindley*

The judgments of the Court of Appeal and House of Lords in this case concern the issue of whether or not it was justified for the Home Secretary to uphold Myra Hindley's whole life tariff in 1997<sup>6</sup> for the sadistic child-murders for which she was convicted in 1966. As a general question of legality the issue has been made somewhat redundant by s.269 of the Criminal Justice Act 2003, which provides a clear legal basis for the whole life tariff.<sup>7</sup> The *Hindley* appeals, all heard prior to the

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<sup>6</sup> *Hansard* H.C. Debates, 10<sup>th</sup> Nov 1997 Col 420; upholding previous Home Office policy of 1990 and 1994 despite a previous Home Office-imposed tariff of 30 years, and also recommendations by Lane LCJ and the trial judge that she should serve 25 years.

<sup>7</sup> Note on language: the determination of the period of imprisonment is described in the appeal judgments as a "tariff"; the 2003 legislation refers to the "minimum term" (s.269(2)) that an offender will serve after being given a life sentence, and a "whole life order" that is imposed in the most serious murders (s.269(4)).

passing of this legislation, involve both the very existence of the whole life tariff and its specific applicability to Myra Hindley. The history of judicial recommendations, executive decisions and appeals arising from these decisions has raised highly sensitive and controversial questions concerning the legitimate expectations of prisoners regarding their future release<sup>8</sup> and the respective roles of executive and judiciary in setting tariffs.<sup>9</sup> The case has also provided an opportunity for an invigoration of feminist perspectives on violence which largely focus either upon male violence against women (rape, marital abuse) or defences for battered women who kill.<sup>10</sup> The Divisional Court rejected Hindley's application for judicial

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<sup>8</sup> See Foster, S. 'Preserving prisoners' expectations: the public law protection of prisoners' rights' (1998) 2 (2) J Civ Lib, pp. 73-94

<sup>9</sup> On the dangers of political motivation in setting tariffs, see Valier, C. 'Cruel Britannia' (2002) *Counsel*, pp. 14-15; also Block, B. 'Two Murdering Women' (1998) 162 (5) *JP* p.90. See also Shute, S. 'The Place of Public Opinion in Sentencing Law' (1998) *Crim LR* pp. 465-77. See also Mills, B. 'Taking the politics out of sentencing' (2002) 152(7040) *NLJ* 1077 at p. 1081; For a defence of the Home Secretary's role in this regard see Coutts, J. A. 'Whole life tariff after mandatory life sentence' (2000) 64 (5) *J Crim L* pp. 491-4

<sup>10</sup> For contributions to the 'traditional' view of femininity and violence, see Edwards, S. S. M. *The gender politics of homicide* in Edwards, *Sex and Gender in the Legal Process* (London: Blackstone, 1996). See also Barnett, H. *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing Ltd, 1998) pp. 251-64, pp. 265-73. Also Bell, C. and Fox, M. 'Telling Stories of Women Who Kill' (1996) 5 (4) *S & LS* pp. 471-94. A more radical perspective which accommodates the possibility of women being the perpetrators of crime committed for reasons other than intolerable circumstances can be found in Heidensohn, F. *Women and Crime* (Basinstoke: Macmillan, 1996); See also Birch, H. (ed.) *Moving Targets: Women, Murder and Representation* (London: Virago, 1993)



review on the grounds that, in allowing for the consideration of the prisoner's reform, the 1997 Home Office policy was not unlawful.<sup>11</sup> The Court of Appeal dismissed Hindley's appeal against this decision<sup>12</sup> with leave to appeal to the House of Lords,<sup>13</sup> who came to the same decision. She died in prison aged 60 on November 15 2002.

In her appeal to the House of Lords, Hindley contended four points – the fourth of which will be addressed in this paper. First, the House of Lords rejected Hindley's argument that according to the Murder (Abolition of Death Penalty) Act 1965, a sentence of 'life imprisonment' should be a finite period. For Lord Steyn the lifelong period of the licence on which 'lifers' may be released under the Prison Act 1952 s.27 (now replaced by the Criminal Justice Act 1991 s.35) indicates that 'life' for the Murder Act is an "indeterminate period", to be brought to an end either by the death of the prisoner or upon the Secretary of State's discretion.<sup>14</sup> Lord Steyn refers with approval to Lord Bingham's statement in the Divisional Court that "in principle"<sup>15</sup> a very heinous crime may be punished with a whole life

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<sup>11</sup> *R v Secretary of State for the Home Department ex parte Hindley* [1998] QB 751; per Lord Bingham, p. 770: "Mr Howard did, in his Parliamentary statement of 7 December 1994, unlawfully fetter his discretion [because his policy was] confined to the considerations of retribution and deterrence... The statement of Mr Straw on 10 November 1997 did, however, remedy this defect [by considering] exceptional progress by the prisoner whilst in custody."

<sup>12</sup> *Hindley*, *supra*, n.1

<sup>13</sup> *Hindley*, *supra*, n.2

<sup>14</sup> *Ibid.*, p. 389

<sup>15</sup> *Hindley*, *supra*, n 11, p. 769

tariff.<sup>16</sup> Second, Hindley's argument that the whole life tariff unlawfully excludes the discretion of the Parole Board was rejected, since the 1997 policy does not exclude matters of reform.<sup>17</sup> Third, the courts also rejected the argument that Hindley's finite tariff prior to 1990 gave her a legitimate expectation of release,<sup>18</sup> because although the decision to set Hindley's tariff at 30 years had been made in 1985, it was never communicated to her.<sup>19</sup> Counsel for Hindley claimed that the rule in *Pierson* should be broadened to include non-communicated tariffs, since Hindley could not have contemplated that hers would be much longer than 30 years. Lord Steyn replied simply: "There is no principled basis for this argument and I would reject it."<sup>20</sup> Fourth, counsel argued unsuccessfully that the whole life tariff is unreasonable in Hindley's case because it gives insufficient consideration to her young age (twenty-two) or Brady's influence in 1966.<sup>21</sup>

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<sup>16</sup> Ibid. This interpretation of 'life imprisonment' is supported in McDiarmid, C. 'Children Who Murder: What is Her Majesty's Pleasure?' (2000) *Crim LR* pp. 547-563; For an opposing view, see Blom-Cooper, L. and Morris, T. 'Life Until Death: Interpretations of Section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965' (1999) *Crim LR* pp. 899-905 who argues that there is no indication that Parliament intended 'life imprisonment' to equate with a prisoner's natural life.

<sup>17</sup> *Hindley*, n 1 above, per Lord Woolf MR, p. 170, applying the Crime (Sentences) Act 1997

<sup>18</sup> Counsel relied on *Pierson v Secretary of State for the Home Department* [1998] AC 539; All ER 577

<sup>19</sup> *Hindley*, *supra*, n 2, p. 391

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, p. 392 for Lord Steyn's rejection of this argument.



One might construe *Hindley* as part of a larger apparent resurgence of retributive ideology in recent years.<sup>22</sup> Commentators have pointed to recent political rhetoric in which talk of protecting civil liberties and punishment being for a rehabilitative purpose for the criminal has to a large extent been replaced with demands for tougher law enforcement policies and more punitive criminal sentences.<sup>23</sup> Shortly before Hindley's death, the Court of Appeal directed that in cases involving the sexual or sadistic murder of children, trial judges should recommend a minimum prison term that "offer[s] little or no hope of the offender's eventual release" or else decline to set a minimum term at all.<sup>24</sup> The Criminal Justice Act 2003 incorporates provisions to ensure that in cases of "the murder of a child if involving the abduction of the child or sexual or sadistic motivation" there is no minimum term of imprisonment (resulting in whole life imprisonment).<sup>25</sup>

## 2.2 'Two Little Animals': Robert Thompson and Jon Venables

If *Hindley* demonstrates a resurgence of 'retributivist' and 'law and order' rhetoric, it seems that the judgments on Thompson and Venables represent a continuing significance of welfarist and rehabilitative thinking. Jon Venables and Robert Thompson were convicted of murder. Since they were both under 18 years old, they

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<sup>22</sup> See Garland, D. *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, I.L. and Oxford: University of Chicago Press and Oxford University Press, 2001) pp. 8-9

<sup>23</sup> *Ibid.*, pp. 12-13; also pp. 58-9

<sup>24</sup> Practice Direction (criminal: consolidated) [2002] 3 All ER 904 para 49.19

<sup>25</sup> s. 269(4) and (5) and Schedule 21(4)

were not sentenced to ‘life’ imprisonment. Instead, they were sentenced to serve a prison sentence at “Her Majesty’s Pleasure” under the Children and Young Persons Act.<sup>26</sup> Their subsequent release after serving eight years was considered highly controversial given the horrified public reaction to their murder of two-year-old Jamie Bulger when they were both eleven years old.<sup>27</sup> At their trial and while in prison, injunctions were granted which prohibited the publication of certain information about them. On expiry of these injunctions when they reached the age of 18 both applied for new injunctions prohibiting publication of information regarding their new identities, physical appearance and new residence upon release. This was granted by Dame Butler-Sloss in the High Court, Family Division.<sup>28</sup> In passing sentence the trial judge had recommended that Thompson and Venables serve eight years for their crime in 1993. Lord Taylor LCJ considered that ten years would be appropriate. However, on the basis of an earlier policy statement (to the effect that prisoners sentenced under the Children and Young Persons Act shall be treated in the same way as adults sentenced to ‘life’ imprisonment<sup>29</sup>), the Home Secretary decided to set the tariff at fifteen years. This decision was appealed and

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<sup>26</sup> s.53 (1); Now incorporated into the Powers of Criminal Courts (Services) Act 2000, s.90.

<sup>27</sup> *Re Thompson, supra*, n.3, p.741. For commentary see Morton, J. ‘The End of the Matter?’ (2001) *NLJ* 15 (6966) p.5; also (editorial) ‘Sauce for the Goslings’ (2000) 150 (6958) *NLJ* p.1607

<sup>28</sup> *Venables v News Group Newspapers Ltd* [2001] 2 WLR 1038 (Fam Div). For commentary see Mahendra, B. ‘Property in Privacy and Confidentiality’ (2001) *NLJ* 151 (6979) pp. 531-2. See also Conway, H. ‘Anonymity for Venables and Thompson’ (2001) *L Ex* pp. 24-25



eventually overturned in the Court of Appeal<sup>30</sup> in favour of periodic assessments of the boys in conformity with welfare considerations in s.44(1) of the Children and Young Persons Act 1933. The Court of Appeal's judgment was upheld by the House of Lords.<sup>31</sup> Following a ruling in the European Court of Human Rights that tariffs should be set by an "independent and impartial tribunal"<sup>32</sup>, Lord Woolf CJ decided that, having served eight years in a young offenders institution, the prisoners should be released rather than transferred to an adult prison. The reasons given by Lord Woolf relate almost entirely to considerations of character reform. He accepted psychiatric evidence that strongly indicated an impressive reform of character on the part of both prisoners while in their separate secure units.<sup>33</sup> He praises them for having "done all that is open to them to redeem themselves".<sup>34</sup> Since that judgment, the Criminal Justice Act 2003 has set the starting point for setting a minimum term for offenders between the ages of ten and seventeen at 12 years.<sup>35</sup> In a case similar to that of Thompson and Venables, this figure would be

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<sup>29</sup> Michael Howard, *Hansard (H.C. Debates)*, 27 July 1993, cols 861-864: Ruling, in effect, that both classes of prisoners must serve a tariff set by the Home Secretary in the interests of retribution and deterrence prior to considerations of risk and reform in recommending release.

<sup>30</sup> *R v Secretary of State for the Home Department ex parte Thompson* [1997] 1 All ER 327 (CA)

<sup>31</sup> *ex parte Thompson*, *supra*, n.4

<sup>32</sup> Art. 6(1) ECHR, interpreted in *T v United Kingdom* (2000) EHHR 121 at p. 200 as requiring decisions regarding tariffs to be made by a judicial rather than a political figure.

<sup>33</sup> *Re Thompson and Another*, *supra*, n.3, p. 740

<sup>34</sup> *Ibid.*, p. 742

<sup>35</sup> s.269(5), Sched. 21(7)

subject to aggravating factors such as the victim's particular vulnerability<sup>36</sup> and mitigating factors such as the very young age of the offenders<sup>37</sup>.

### 3. The Conjoined Twins

#### 3.1 *The Dilemma*

The much debated case of *Re A* represents a profound challenge for liberal principled jurisprudence. The facts of that case, although well known, are not uncontroversial. Perspectives on the identification of the children's factual situation play an important part of our analysis, so introductory remarks are made with caution. The fundamental problem was that, while Kantian and human rights approaches to justice begin with the premise that all worthwhile beings are individuated, this case involved two beings that, although both explicitly deemed to be worthwhile, were conjoined in an apparently incompatible fashion. There were, however, significant differences between the two children. Crucially, the heart of the weaker twin, Mary, was so weak that she depended upon blood supplied from the heart located in the body of her much stronger sister, Jodie. It was estimated that if they remained conjoined the twins might live for up to a year before the strain on Jodie's heart would result in its failure and the subsequent death of both twins. However, if separated there was a good chance that Jodie would survive to

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<sup>36</sup> s. 269(5), Sched. 21(10)(b)

<sup>37</sup> s. 269(5), Sched. 21(11)(g)



live a full life. The problem, of course, was that in cutting off Mary's supply of oxygenated blood, this would almost certainly result in her death. A hospital applied for permission from the court to undertake the operation to separate the twins in order to allow Jodie to live a full life. Further differences were that, whereas Jodie was judged to be normal in respect of bodily organs, responses and brain development, Mary was deficient in all three respects. Her brain was described as "primitive", and having no functional lungs she could not cry or make any responses. The case traverses the borders of criminal, medical and family law for which it quickly provoked a wealth of commentary on its legal basis and implications. Sabine Michalowski<sup>38</sup> criticises the Court of Appeal judges for applying precedent in a way that erodes the principle of sanctity of life. J.C. Smith<sup>39</sup> and Fiona Leverick<sup>40</sup> address the compatibility of self defence and the right to life after *Re A*. Jenny McEwan<sup>41</sup> examines the possible change brought to the defence of necessity in murder cases. Huxtable<sup>42</sup> and Black-Branch<sup>43</sup> critique the role of

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<sup>38</sup> Michalowski, S. 'Sanctity of Life: Are Some Lives More Sacred Than Others?' (2002) 22 (3) *Legal Studies* pp. 377-397

<sup>39</sup> Smith, J.C. "Use of Force in Public or Private Defence and Article 2" (2002) *Criminal Law Review* pp. 958-962

<sup>40</sup> Leverick, F. 'A Reply to Smith' (2002) *Criminal Law Review* pp. 963-967

<sup>41</sup> McEwan, J. "Murder By Design: The 'Feel Good Factor' and the Criminal Law" (2001) 9 (3) *Medical Law Review* pp. 246-58

<sup>42</sup> Huxtable, R. "Separation of Conjoined Twins: Where Next for the Criminal Law?" (2002) *Criminal Law Review* pp. 459-470

<sup>43</sup> Black-Branch, J. L. 'Being Over Nothingness: The Right to Life under the Human Rights Act' (2001) 26 *European Law Review* pp. 22-41

human rights discourse in the Court of Appeal's judgment. Others have focussed on the philosophical questions raised. The problem of 'personhood' is addressed by John Harris<sup>44</sup> and Helen Watt<sup>45</sup>; David Wasserman<sup>46</sup> considers the question of ownership of the organs shared by the twins; Vanessa Munro<sup>47</sup> suggests an alternative to the liberal rights basis as a theoretical approach to the dilemma. In later chapters, this thesis will draw together certain aspects of the legal and philosophical issues in *Re A* in developing its argument as to the linguistic construction of liberal principle in legal judgment and the implications of this construction.

### 3.2 *The Parents*

Although obliged to base their decision on the best interests of the children, rather than the parents, the parents' views were received with sympathy and arguably

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<sup>44</sup> Harris, J. 'Human Being, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in *Re A*' (2001) 9 (3) *Medical Law Review* pp. 221-236

<sup>45</sup> Watt, H. 'Conjoined Twins: Separation as Mutilation' (2001) 9 (3) *Medical Law Review* pp. 237-45

<sup>46</sup> Wasserman, D. 'Killing Mary to Save Jodie: Conjoined Twins and Individual Rights' (2001) 21 (1) *Philosophy & Public Policy Quarterly* pp. 9-14

<sup>47</sup> Munro, V. 'Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights' (2001) 10 (4) *Social and Legal Studies* pp. 459-482



played some part in the case in stressing the principle of sanctity of life.<sup>48</sup> The parents of the conjoined twins were Roman Catholics and they lived on the island of Gozo, near Malta. These two facts presented two specific problems. On the basis of the sanctity of human life, the parents were opposed in principle to any measure that would bring about the death of either child. They were therefore opposed to any choice of lives between the two children after they were born. A second problem, raised as a symptom of their living on a remote island, was that there would be insufficient medical facilities to care adequately for a disabled child. If Jodie were to survive, but be rendered disabled by the operation, life in her homeland would be very difficult.

### 3.3 *The Appeal*

Upholding the decision of the High Court (but for different reasons) the Court of Appeal held that the separation should be allowed and that the hospital would not be liable for the subsequent death of the weaker twin. The three Lord Justices gave different reasons for allowing the operation. Ward LJ held that the separation was justified on the basis that, given that both children had an equal, yet incompatible right to life, it was possible to make a choice between their lives. Robert Walker LJ, agreeing with the reasoning of the High Court Judge, relied on a controversial definition of ‘best interests’. He found that, since Mary’s life could only bring pain

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<sup>48</sup> On the legal status of the wishes of the family of incompetent patients, see *Re G (PVS)* [1995] 2

FCR 46, in which it was held that their views were “very important” but could not be a veto on

and discomfort to her, separation (and hence her death) was beneficial for both children.<sup>49</sup> Thirdly, Brooke LJ disagreed with Robert Walker's 'best interests' reasoning but decided that, applying the defence of necessity, Mary was identified for death by virtue of her relative inability to live separately, compared to her sister. Other possible bases for deciding the case were considered and rejected by the majority, notably the doctrine of Double Effect.<sup>50</sup> Ward LJ draws attention to the dilemma of the case by reiterating the importance that the right to life is independent of all contingencies:

“[I]t is impermissible to deny that every life has an equal inherent value. Life is worthwhile in itself whatever the diminution in one's capacity to enjoy it and however gravely impaired one's vital functions of speech, deliberation and choice may be.”<sup>51</sup>

How can it be then, that the physical and mental differences between Jodie and Mary can justify choosing between their lives? There are many other cases that

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medical treatment.

<sup>49</sup> For support for this position see Freeman, M. 'Whose Life is it Anyway?' (2001) 9 (3) *Medical Law Review* 259-80. For a rejection of the same, see Watt (2001) *supra*, n.45, p.239

<sup>50</sup> For majority decision on Double Effect see Ward LJ, *Re A*, *supra*, n.5, p. 1012 and Brooke LJ, p. 1030; Robert Walker LJ dissented on this point, p. 1063

<sup>51</sup> *Re A*, *supra*, n.5, p. 1001



could be considered in order to study the various aspects of the court's reasoning.<sup>52</sup>

Two recent English cases warrant some discussion here. In *Airedale NHS Trust v Bland*<sup>53</sup> the withdrawal of life-prolonging treatment and feeding of a young man in a permanent vegetative state, was held to be lawful by the Court of Appeal and House of Lords on the basis of a 'patient's best interests' test. A pivotal issue in *Bland* was, as in *Re A*, the relevance of a person's quality of life with respect to the ethical principle of the sanctity of life. Both Court of Appeal and House of Lords agreed that, in a case where a person has no awareness of his own life at all, it would not be unlawful to remove treatment, death resulting as a result of the patient's own inability to survive. As Hoffman LJ put it, although there can be no definite formula for deciding a clash of principles, it would show more respect to "allow him to die with dignity" rather than be kept "grotesquely alive".<sup>54</sup> This case is relevant in considering *Re A* for several reasons. Firstly, like Hoffman LJ, Brooke LJ relies upon a judgment that death might be inferred to be in a patient's best interests. Second is the question as to whether there is a moral distinction to be made between 'allowing' a patient to die by withdrawing treatment and actively killing him. Certainly, the court in *Bland* accepted this as a legal distinction, despite moral reservations. The legal position seems to be that, if there is a duty to keep a patient alive, then it is impermissible to bring about their death whether by

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<sup>52</sup> For example, *R v Dudley and Stephens* (1884) 14 QBD 273 per Lord Coleridge on the defence of Necessity, and Lord Donaldson MR in *Re J* [1991] Fam LR 33 on the doctrine of Double Effect.

<sup>53</sup> (1993) 1 All ER 821

<sup>54</sup> *Ibid.*, p. 854

omission or by act.<sup>55</sup> Whether such a duty exists depends upon whether the patient's 'best interests' involve being kept alive. Until a patient is judged to exist in a permanent vegetative state (PVS), it is generally assumed that their best interests involve continued life and it is therefore homicide to bring about that person's death either by act or omission<sup>56</sup>. Once a state of PVS is diagnosed, the patient is judged to no longer have any such best interests and his life may be brought to an end passively, that is, by withdrawal of treatment. In *Re A* the majority of the Court of Appeal judged Mary to have an interest in continued life since she was not in such a state, and so on the *Bland* 'best interests' test, her life could not be ended by either passive or active means. In this respect *Re A* and *Bland* are clearly distinguishable. A fourth aspect of *Bland* that is relevant to our study of *Re A* are views expressed as to the importance of a person's 'biographical' life (that which Harris calls 'personality') and his ability to live without external support. The next chapter considers the moral status of Mary's life with respect to her failure in this regard.

The second recent case of general relevance is *R (Pretty) v DPP (Secretary of State for Home Dept. intervening)*<sup>57</sup> in which the Court of Appeal dismissed Dianne Pretty's appeal against the refusal of the Director of Public Prosecution to sanction her assisted suicide. Involving a person fully conscious and competent who makes a specific claim about the meaning of the right to life, *Pretty* stands in stark contrast to *Re A*, and our interest lies in the relationship between Article 1 and

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<sup>55</sup> See *Bland*, *supra*, n. 53, per Lord Lord Mustill, p.890-1.

<sup>56</sup> Kennedy, I. and Grubb., A. *Medical Law* (London: Butterworths, 2000) p.2120



two principles that are often claimed to both underlie it and simultaneously conflict with each other: the ‘sanctity of life’ and ‘autonomy’. The case was brought under Articles 2, 3, 6 and 7 of the European Convention of Human Rights, although I shall restrict these comments to the arguments as to the interpretation of the principle of the Right to Life, protected by Article 2. It was argued on behalf of the claimant that the right to life should be interpreted as an expression of autonomy, giving rise to the wider right of self-determination regarding one’s own life *and* death: that article 2 confers a freedom for the individual to make the choice as to whether to continue or end life. The House of Lords unanimously dismissed this argument on the basis of the sanctity of human life.<sup>58</sup> Lord Hope expressed his opinion that the right to life must be narrowly construed. It creates neither a right to life, nor to death, but merely *recognises* the right to life “inherent in the human condition which we all share.”<sup>59</sup> The previous chapters examined the Kantian liberal notion that principles such as the right to life accrue to individuals in part by virtue of their autonomy and capacity for rational and reasonable thought. The next chapter examines how the identification or non-identification of such capacities provide a basis for interpreting the right to life in *Re A*. In *Re A*, although the conflicting lives were both judged by the Court of Appeal to be sacred in the liberal moral sense, the potential for autonomy in Jodie was significant in ensuring that her right of life was protected at the expense of Mary, who lacked such a potential. In *Pretty*, on the other hand, autonomy and sanctity of life are interpreted as

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<sup>57</sup> [2001] 3 WLR 1598

<sup>58</sup> *Ibid.*, per Lord Bingham, p. 1603.

antagonistic: the claimant's submission as to the meaning of the right to life – based on her own demand for autonomy – was rejected because it would offend the principle of the sanctity of life. Viewing this problem in the context of *Bland* allows us to link it to the distinction in law already discussed as between acts and omissions. The court in *Bland* decided that they had avoided offending the principle of sanctity of life because the consequences of the judgment would result from omitting to do what was not legally required anyway (since his 'best interests' did not involve continued life), and hence his own bodily failure rather than any positive action by another was the *moral* cause of death. In contrast, *Re A* and *Pretty* both involved the possibility of a death that would definitely result from the positive actions of others. Lord Bingham states that *Pretty*'s case invited courts to effectively collapse the distinction between acts and omissions, and hence open the door to an acceptance of euthanasia generally.<sup>60</sup> Unlike *Re A*, there were no other reasons to allow the appeal. Based ultimately upon this argument from autonomy therefore, her appeal had to fail. *Re A* is particularly interesting because it illustrates how significant the existence of 'other reasons' can be for interpreting matters of principle. In *Re A* this means reasons from outside of the frame of liberal principle are incorporated within this interpretive process, resulting in a definition of the right to life that is different to the one found in *Pretty*.

That the Court of Appeal in *Re A* approached the case from a liberal individualist perspective is not in doubt. Despite the dependency of Mary upon

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<sup>59</sup> *Ibid.*, p. 1635

<sup>60</sup> *Ibid.*, p. 1603



Jodie for blood supply, the twins were agreed by all the justices to be two legally separate children. What is in doubt is the role of the corollary principle of the sanctity of life in deciding the case. If the principle is correctly expressed in the passage from Ward LJ's judgment cited above, then the fact that Mary was severely disabled and had nothing useful to offer either her sister or anyone else would not be relevant. Nor would the fact that Mary was "doomed for death in any event".<sup>61</sup> In other words, if the Court of Appeal's decision was based on the principle of the right to life as it is understood in its Kantian de-ontological sense, then questions of either child's capacity to enjoy its respective life and the length of those lives would surely not arise. But such questions did arise, and intuitively it seems right that they should. If both twins must die if no steps are taken, why not attempt to save one? Such utilitarian thinking is difficult to resist and it is clear that the intuitive arithmetic sense of killing one baby in order that one, rather than neither, should live played in the judges' minds. Ward LJ refers to his decision negatively when he remarks: "I can see no other way of dealing with it than by choosing the lesser of the two evils and so finding the least detrimental alternative."<sup>62</sup> Nevertheless the decision is considered to be "justified"<sup>63</sup> as opposed to merely 'excused'. In order that the killing would not amount to an unjustified infringement of a life<sup>64</sup> the reasoning had to embrace a complex mixture of principle and consequentialism. As Ward LJ has stated, a choice of lives simply on the basis of potential is

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<sup>61</sup> *Re A*, *supra*, n.5, p. 962

<sup>62</sup> *Ibid.*, p. 1006

<sup>63</sup> *Ibid.*, p. 963

<sup>64</sup> Formally prohibited by the Human Rights Act 1998 and the criminal law of murder.

unjustifiable. But if a choice of lives based on potential is unjustifiable, how can the decision nevertheless be justified?

#### 4. Conclusion

This chapter has presented an account of the challenges and problems that are posed by the legal and legislative problems for the liberal approach outlined in the previous chapter. As the next chapter attempts to argue, the judgments given in *Re A* reinforce what I regard as the crucial moral difference between the cases involving Myra Hindley and Thompson and Venables. The difference relates to the moral standing of the parties in the case, which largely determines the kind of judgment that is possible from a liberal principled perspective. Of course, the cases singled out for analysis here represent only a fraction of English case-law that would be relevant and interesting for an analysis of the role of principle in situations of apparent ethical dilemma. I will not attempt to provide a fully developed and coherent justification for the decision to focus upon *Re A*, *Re Thompson and Another* and *ex parte Hindley*. All I can say is that the particular interplay between moral and legal principle in these judgments do appear to be in many ways unique. However, the general question of judicial interpretation of principles in profoundly challenging situations is raised in other cases also. I hope that the discussion of these cases at least provides an engaging study. To use a Derridean expression that will itself become an object of analysis in Chapter Seven,



the ultimate justification for the decision is a secret: its ultimate justification is mysterious.

## Chapter 4

### The Compromise of Liberal Justice

#### 1. Introduction

This chapter focuses upon the way in which the liberal principles considered in Chapters One and Two are constructed in legal language in the cases discussed in the previous chapter. Does the case of the conjoined twins, involving the problem of the justification of ending one person's life in order to save another, illustrate the by-passing of the right to life in order to achieve a utilitarian goal, or does it instead simply reinterpret the right in the light of that goal? Do the cases dealing with the punishment of Robert Thompson and Jon Venables indicate an eschewing of the liberal considerations of the retributivist principle demonstrated in Myra Hindley's appeals, or, again, merely a difference of interpretation between cases? This chapter puts an argument for the latter point in both instances. Examining the rhetoric used by the judges in describing and judging these cases, it is argued here that the interpretation of liberal principle contains both principled and supposedly external utilitarian logic. It is argued that judicial rhetoric reveals that judgment on matters of principle is impure: a negotiation between principled and non-principled considerations.

In establishing the community, each individual is necessarily required to abide by the conditions of reasonableness and mutual moral regard. No norm or rule or judgment can be justified unless it were considered so by all such individuals. This is the liberal idealisation of the arena of principled justification as a community of morally autonomous individuals which, interpreted in the light of



the contingencies of the facts of the cases, provides a foundation for our initial critical engagement with legal judgment.

## 2. The Conjoined Twins: A Problem of Incompatible Lives

Agamben quotes Carl Schmitt as observing: “He who determines a value, *eo ipso* always fixes a non value. The sense of this determination of a non-value is the annihilation of the non value.”<sup>1</sup> It is the determination of the value (and ‘non-value’) of life with respect to the right to life in the case of *Re A* that interests us here. It is argued that, although the majority in the Court of Appeal refused to justify bringing about Mary’s death as an unintended though inevitable consequence of life saving surgery,<sup>2</sup> the identification of a significant difference in value between the twins underpins the justification of all three judges’ decisions.

### 2.1 *Ends and Means to Ends*

If there is a duty to hold that the weaker twin, Mary, is an end in herself and thus a full moral agent, then the separation is not justifiable according to Kantian principle, assuming that death is not in her interests. This implies that if the reverse is true – that Mary is not to be accorded this moral status – then her life could be rightly ended if this will bring a significant benefit. The rhetoric of the Court of

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<sup>1</sup> Carl Schmitt, quoted by Agamben, G. in *Homo Sacer: Sovereign Power and Bare Life*, Heller-Roazen, D. (trans.) (Stanford, C.A.: Stanford University Press, 1998) p.137

<sup>2</sup> *Re A (Conjoined Twins Medical Treatment)* [2000] 4 All ER 961, p. 975. On this point, the majority comprised of Ward LJ and Robert Walker LJ and the minority view was expressed by Brooke LJ. It should be noted, however, that all three judges agreed on the final decision.

Appeal suggests that the early death of Mary is justified by her failure to establish herself within the practical scope of the right to life, and this in turn because of the characterisation of her by the court as lacking the qualities of Kantian ‘humanity’. This is not to say that the court deliberately adopted a Kantian approach. However, in the judges’ emphasis upon her brutal egocentricity in threatening the life of her sister Jodie, her lack of autonomy and her lack of rationality, Mary is seen to lack the inherent value that Kant accords to the humanity of the Kingdom of Ends. One should exercise caution in applying theories of personhood, Kantian or otherwise, to legal reasoning. Legal human rights authorities do not provide an indication that a person’s rights are contingent upon their own particular powers of rationality or autonomy. Apart from cases in which a person is in a permanent vegetative state<sup>3</sup> or “doomed”<sup>4</sup>, considerations of personhood are not open to a court of law.<sup>5</sup> However, *Re A* is a case that forces these very considerations to the surface. In their grappling with the dilemma, we witness the judges’ decisions on the conjoined twins as a tracing of the outer limit of the right to life. Discussion of the right to life exposes a conception of personhood, both positively in the significance of Jodie’s potential for moral and physical autonomy and negatively in the significance of Mary’s in this regard. Acknowledgement should be made at this point to a certain moral assumption in characterising the difference between Jodie and Mary as being one of

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<sup>3</sup> *Airedale NHS Trust v Bland* [1993] 1 All ER 821

<sup>4</sup> *Re C (a minor) (wardship: medical treatment)* [1989] 2 All ER 782. In this case it was held by the Court of Appeal that a baby diagnosed with a very serious form of hydrocephalus, who was born with irreparable and terminable brain damage, could be allowed to die on account of the hopelessness of her case.

<sup>5</sup> See Sheldon, S. and S. Wilkinson, S. ‘On the Sharpest Horns of the Dilemma: *Re A* (Conjoined Twins)’ (2001) 9 (3) *Medical Law Review* pp. 201-7, p.6



*potential*. Other commentators on the moral justification of the decision in *Re A* have shunned this appeal to potentiality. For example, Harris argues that a more important observation is that both twins actually lack personhood on account of their equal inability to value their own existence.<sup>6</sup> Like the Court of Appeal, Harris wants to find an escape route from the dilemma. His view of personhood enables the operation to separate as lawful but not mandatory since the lives at risk are not those of ‘persons’ in the first place. For very different reasons, Watt also rejects potentiality, insisting that both children should be respected as equal “member[s] of the rational human species”.<sup>7</sup> Watt’s position is calculated to resist what she regards as an attitude of body-fascism towards the disabled and the worth of their lives.<sup>8</sup> However, it is difficult not to associate her appeal to the human species with what Dworkin describes as the ‘conservative’ view of the inherently sacred quality of all human life that provides a basis for arguing that all abortion, euthanasia (whether passive or active) and assisted suicide is wrong.<sup>9</sup>

In Kant’s moral theory, autonomy - the capacity to consider the possibility of universalising one’s decisions - is one of the key requirements for being treated as an end in itself. If there is anyone who fails to qualify as autonomous it is Mary.

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<sup>6</sup> Harris, J. ‘Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in *Re A*’ (2001) 9 (3) *Medical Law Review* pp.221-236, pp. 233-5; See also J. Harris, ‘The Concept of the Person and the Value of Life’ (1999) 9 (4) *Kennedy Institute of Ethics Journal* pp. 293-308

<sup>7</sup> Watt, ‘Conjoined Twins: Separation as Mutilation’ (2001) 9 (3) *Medical Law Review* pp. 237-45 p. 240

<sup>8</sup> *Ibid.*, p.239

<sup>9</sup> Dworkin, R. ‘Dying and Living’ in Dworkin, R. *Life’s Dominion* (London: Harper-Collins, 1993) Chapter Seven; also printed as Part 2 of Chapter Seven in Harris, J. (ed.) *Bioethics* (Oxford: Oxford University Press, 2001) pp.187-204

Her physical and mental condition meant that while she lived she would always only be egocentric – the very opposite of a Kantian moral agent. Not only was Mary physically dependent upon her sister Jodie to stay alive, she was also endangering Jodie’s own life by putting her heart under huge strain. Secondly, having a poorly developed, even “primitive”<sup>10</sup> brain, there was no question of Mary developing the capacity for understanding the requirements of others or (therefore) the idea of justice as universal.

Ward LJ rejects the submission that Mary’s death may be regarded as an unintended side-effect of the intended good purpose of saving Jodie’s life and thus refuses to justify the operation through Double Effect reasoning.<sup>11</sup> Instead he focuses on the threat caused by Mary to Jodie, and in doing so states that a right to life is not necessarily a guarantee of life. “Mary may have a right to life, but she has little right to be alive”.<sup>12</sup> Why? Because “she sucks the lifeblood out of Jodie”. In identifying the ‘facts’ of the case, Ward LJ’s language is full of violence. For instance, he compares the threat unwittingly posed by Mary to her sister with a boy under the age of criminal responsibility who fatally shoots his classmates.<sup>13</sup> He later says: “Mary is killing Jodie... as surely as a slow drip of poison. How can it be just that Jodie should be required to tolerate that state of affairs?”<sup>14</sup> These analogies

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<sup>10</sup> *Re A, supra*, n.2, p. 975

<sup>11</sup> *Ibid.*, p.1012. Ward LJ argues that, since the good effect of saving Jodie can only be brought about by cutting Mary’s oxygen supply, it cannot be said that the action would be in both twins’ best interests. Recall that Double Effect cannot justify harming one person as a means to saving another (see Chapter Two, s.1.3., *supra*.)

<sup>12</sup> *Re A, supra*, n.2, p. 1010

<sup>13</sup> *Ibid.*, p. 1017

<sup>14</sup> *Ibid.*, pp. 1016-17



have been criticised by some commentators for being overly dramatic,<sup>15</sup> but in ascribing Mary and Jodie the identities of aggressor and victim respectively, Ward LJ provides an invaluable insight as to judicial interpretation of principle. He insists that this situation of threat and aggression is “the reality” of the situation,<sup>16</sup> and that this is not a moral judgment, but a legal one. This appeal to ‘reality’ invites a little unpacking. That which we describe as ‘real’ is that which we regard as indubitably true. Is it indubitably true that Mary’s role is as the aggressor and Jodie the victim? I regard that this very much depends on one’s perspective on which aspects of the ‘facts’ in this case are significant. As Munro points out,<sup>17</sup> we could look at the case equally well as one involving emotional and physical connection and interdependence between the children. Admittedly it could be retorted that the dependence between the children is purely one-way: based on the medical prognosis, Jodie has nothing to gain in terms of life expectancy or quality by being attached to Mary. But if one regards the children not as competing individuals but as a unique entity, then Mary cannot be said to be a threat simply by virtue of her existence. The twins are a unit, a bond, which however short its potential existence, is an existence nonetheless.<sup>18</sup> But without recourse to an argument of threat, the escape route sought by the court would not be possible. Having ruled out a simple choice of lives based on Jodie’s potential and Mary’s best interests, Ward LJ has no

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<sup>15</sup> See Eliot, C. ‘Murder and Necessity following the Siamese Twins Litigation’ (2001) 65 (1) *Journal of Criminal Law* pp. 66-75, p. 75

<sup>16</sup> *Re A*, *supra*, n.2, p. 1016

<sup>17</sup> Munro, V. ‘Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights’ (2001) 10 (4) *Social and Legal Studies* pp. 459-482, p. 466

<sup>18</sup> See Michalowski, ‘Sanctity of Life: Are Some Lives More Sacred Than Others?’ (2002) 22 (3) *Legal Studies* pp. 377-397, p. 395

option but to construct the twins in this way. Thus, the identification of Mary as an aggressor may be necessary in reaching a satisfactory decision, but this is not the same as it being *the reality*. If one is convinced that Mary is, as Ward LJ insists, threatening Jodie's life then the judgment can still be interpreted as one of liberal principle. As we saw above, Kant's categorical imperative, although generally disapproving of violence, allows force to be used to defend against unwarranted violence as is necessary to maintain harmony within the community of rational agents. If the Kantian view of the dignified, rational person is of one who considers the compatibility of his own ends with that of all others, then characterising Mary as an aggressor allows a principled distinction to be made between her and Jodie.

Robert Walker LJ also emphasises Mary's lack of physical independence, although his position is somewhat different to that of Ward LJ. He accepts Ward LJ's opinion that the doctrine of Double Effect cannot apply where the proposed action could not be of any conceivable benefit to Mary.<sup>19</sup> However, unlike the majority, Robert Walker LJ regards that the operation would, in fact, be in Mary's best interests, as her life can only bring her discomfort and pain. Conversely, the operation, although inevitably fatal, would give her the bodily integrity which nature denied her.<sup>20</sup> He argues that if the surgery went ahead, Mary's death would result "not because she was intentionally killed, but because her own body cannot sustain life".<sup>21</sup> If a person is reliant on something extra to her own body to sustain a life that that person has no chance of ever valuing in any way whatsoever, then

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<sup>19</sup> *Re A*, *supra*, n.2, p. 1063

<sup>20</sup> *Ibid.*, p. 1069-70

<sup>21</sup> *Ibid.*, p. 1070



there is no legal requirement to continue to preserve it.<sup>22</sup> Thus, Robert Walker LJ uses the liberal principle of autonomy to justify action which would inevitably lead to Mary's death. Robert Walker LJ's judgment is the only one of the three that can be compared to that of the House of Lords in *Bland*, in which the decision to allow Anthony Bland to die was justified on the basis that, given his medical condition, death would bring him more dignity than indefinitely continued life. It has been pointed out elsewhere that the problem with Robert-Walker LJ's reasoning is that whilst Mary's mental and physical functions were indeed severely impaired, she was certainly not in a permanent vegetative state.<sup>23</sup>

Against the background of such comments the right to life is interpreted, not as being departed from in the circumstances, but as drawing a moral distinction between the two children. Given their comments on the equal status of every life and Mary as a separate human being, the judges cannot explicitly say that she has no right to life in a theoretical sense. However, through their rhetoric of aggression, threat and dependence, they make it clear that she is beyond the right's practical limit. The incision of the surgeon's knife thus becomes a gruesome representation of the drawing of the moral limit of the right to life. As Agamben would put it, Mary is an example of "bare life" – with no claim to having value in herself by virtue of any of the liberal identifications of the worthwhile person – she is "a life that can be killed but not sacrificed".<sup>24</sup> Ward LJ concludes that the Human Rights Act 1998 2 (1) should be interpreted as allowing positive steps in defence of one

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<sup>22</sup> This is despite the fact that all of the appeal judges agreed that the operation would be an act, rather than an omission such as switching off a life-support machine.

<sup>23</sup> 'Jodie and Mary: The Medical Facts', BBC News Online, Thursday 7<sup>th</sup> December 2000, <http://news.bbc.co.uk/1/hi/health/920487.stm>

<sup>24</sup> Agamben (1998) *supra*, n.1, p. 133

person's "enjoyment of the right to life" to overrule the "negative obligation to refrain from the intentional deprivation of life" of another.<sup>25</sup> The difference between the theoretical and practical application of the right to life here is clear. In legal terms, the limitation placed on Mary's right to life under Article 2 is not universally accepted. For example, Black-Branch argues that such a move is ruled out by *McCann v U.K.*<sup>26</sup> in which it was held that the provisions of the Convention must be "strictly construed".<sup>27</sup>

In adopting a critical perspective on the judicial construction of principle, it is pertinent to examine why the judges should find it necessary to construct the identities of Jodie and Mary as so fundamentally incompatible. Prior to the development of the technology required to perform the kind of operation required to allow Jodie to survive and lead a normal life, there would be nothing to motivate the rhetoric employed by Ward LJ. Modern surgical technology makes the picture of an opposition of violent competition between Jodie and Mary a meaningful way of describing the twins' physical predicament from a liberal individualistic perspective. I contend that this has nothing to do with being able to know the true facts of the twins' predicament (i.e. that Jodie's heart was pumping blood for both children alive and was suffering a potentially terminal strain as a result), and everything to do with the facts of their relative life potential after separation. It is accepted here that allowing the twins to remain conjoined would have resulted in

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<sup>25</sup> *Re A*, *supra*, n.2, p.1017, applying *Paton v U.K.* (1980) 3 EHRR 408

<sup>26</sup> (1996) 21 EHHR 97

<sup>27</sup> *Ibid.*, p. 147; Quoted in Black-Branch, 'Being Over Nothingness: The Right to Life under the Human Rights Act' (2001) 26 *European Law Review* 22-41, p. 32. See also Michalowski (2002) *supra*, n.18, p. 383, who argues that, since the operation cannot be described as 'treatment' in Mary's case, a balancing of lives is not lawful.



both of their deaths within a few months, perhaps a year. It is also accepted that the results of separation were likely to be the death of Mary and the prospect of a full and normal life for Jodie. What is interesting for our examination of the principled aspect of this case is the relationship between these two facts. For it is because the Court of Appeal attaches significance to both Mary's hopelessness *and* Jodie's potential that the very close (perhaps inseparable) relationship between principle and non-principled consequentialism is exposed. The consideration of Jodie's potential benefit in the surgeons bringing about Mary's death provides the persuasive force needed to cast Mary as an aggressor – as effectively stealing Jodie's life away. This is to say that the moral condemnation of Mary follows both from a principled premise (i.e. who most closely resembles the liberal ideal of personhood) and also from the calculations of potential beneficial and detrimental consequences. Such calculations are excluded from consideration of Rawls's index of primary goods: despite referring to goods rather than Right, the index includes only the *universal* goods, not particular ones.<sup>28</sup> As is shown in the texts of the judgments, such calculations are necessary in forming a coherent narrative of the facts allowing a principled judgment to be made.

The case for consequentialism or efficiency is not difficult to make out. The speeches of all the judges make the case very strongly that, if the operation is not allowed then an opportunity to save a life would be lost. Brooke LJ's focus upon the difference in supposed life expectancy and quality between the two children illustrates this point. Brooke LJ agrees with Ward LJ that the operation cannot be

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<sup>28</sup> See Rawls, J. *Political Liberalism* (New York, N.Y. & Chichester: Columbia University Press, 1996). Rawls states (p. 308) that the most important of these 'primary goods' is 'liberty' and also includes freedom of movement, powers of offices, wealth and self-respect

conceived as a case of good end justifying the means, as it can be of no possible benefit to Mary.<sup>29</sup> The first move Brooke LJ makes is to dismisses any straightforward ‘quality of life’ test, on the grounds that such tests are arbitrary and not of a moral character. However, he then goes on to state that it is enough that the circumstances of the case are such that Mary’s life can be rightfully sacrificed in order to save that of Jodie. He distinguishes the case of *R v Dudley and Stephens*,<sup>30</sup> arguing that, instead of indicating that the defence of necessity could never be an answer to a charge of murder, it showed only that necessity could not be used as a defence where there was no reason for choosing one person over another to be killed. In that case, sailors stranded for days on the open sea in a lifeboat killed and ate the cabin boy in order to stay alive. Brooke LJ points out that in that case the defendants could not be justified because the choice of who to kill was “arbitrary” – there was no reason, apart from his weakness, why the boy should be selected.<sup>31</sup> In the case of the twins however, Mary is “self-designated for a very early death”.<sup>32</sup> Hence there is no arbitrary selection of a victim and her death is justified. If this comment refers simply to Mary’s life-expectancy, does it follow that the decision in *R v Dudley and Stephens* would have been different if there was more certainty that the cabin boy (and not the defendants) were truly doomed? If so then this would suggest that the defendants in *R v Dudley and Stephens* were convicted because the facts of the case simply did not amount to a situation of true necessity. What it means to be ‘designated for death’ is ethically problematic and it is not clear that

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<sup>29</sup> *Re A*, *supra*, n.2, p. 1030

<sup>30</sup> (1884) 14 QBD 273

<sup>31</sup> *Re A*, *supra*, n.2, p. 1041

<sup>32</sup> *Ibid.*, per Brooke LJ, p. 1051



Brooke LJ settles the matter.<sup>33</sup> In the long term the issue seems relatively clear: unlike Mary, Jodie has the capacity to exercise her right to life in the course of a normal life. Hence, the killing of Mary would be justified on the grounds that for her, unlike Jodie, there was nothing that could have been done to improve the quality of life. Since it would be possible to give Jodie the chance of a normal life and Mary was clearly designated for death, Brooke LJ opined that the doctrine of necessity could be used to lawfully prefer Jodie's interests to Mary's. Since it was only Mary's separation from Jodie that could realise this potential, no difficulty arose in identifying who should die.<sup>34</sup>

One might argue, as Michalowski does,<sup>35</sup> that Brooke LJ's interpretation of *R v Dudley and Stephens* is ruled out by the more recent case of *R v Howe*<sup>36</sup> on the principle of the "special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life."<sup>37</sup> Moreover, the notion of identification for death only makes sense on a certain interpretation of the facts of the twins' situation. In order for a comparison between Mary's and Jodie's life prospects to be justified, we are required to regard the children's conjoined lives as analogous to Brooke LJ's

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<sup>33</sup> See Harris (2001) *supra*, n.6, pp. 222-3, who argues that life expectancy is not an appropriate consideration.

<sup>34</sup> Brooke LJ finds support for his interpretation of necessity in Ashworth, A. *Principles of Criminal Law* (Oxford: Oxford University Press, 1999) pp. 153-4 (quoted by Brooke LJ, p. 1042-3)

<sup>35</sup> Michalowski (2002) *supra*, n.18, p. 391

<sup>36</sup> [1987] AC 417

<sup>37</sup> *Ibid.*, per Lord Griffith, p.439

examples of imminent but avoidable disasters<sup>38</sup> in which an identifiable party is already marked for death. A problem with this logic is that Mary was not marked for *immediate* death. While her life expectancy was undeniably much shorter than ‘normal’, some estimates suggested that she and Jodie might have lived for up to a year whilst remaining conjoined. If the test is not to apply also to the elderly and terminally ill, regarding Mary as nevertheless designated for death surely requires an assessment of her quality of life, which Brooke LJ had already ruled out.<sup>39</sup> Applying the logic of disasters to this case as Brooke LJ does, requires that we construct Mary as depriving Jodie of resources which cannot save her, but might save another if she is removed.<sup>40</sup> On this view, Jodie is *unnecessarily* marked for death while she remains attached to Mary: the mark of death can be removed from her by separating her from Mary. The latter would herself continue to be marked for death no matter what was done. As was argued above in relation to Ward LJ’s judgment, the dominance of human rights principles under the ECHR means that a judgment based simply on utilitarian grounds is not possible. Therefore the test of ‘designation for death’ is a combination of both liberal and consequentialist reasoning. We are required firstly to accept that Jodie and Mary are two separate individuals whose interests conflict, one of whom must prevail at the expense of the other. Secondly we have to accept that taking the situation as a whole, the most beneficial course of action is to act to save Jodie even if this means causing the

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<sup>38</sup> e.g. that of the Zeebrugge disaster, in which people were trapped on a rope ladder in water by a petrified man, at risk from drowning until the man was forcibly removed. Referred to by Brooke LJ, p. 1041

<sup>39</sup> *Re A*, *supra*, n.2, per Ward LJ, p.1001

<sup>40</sup> See Wasserman, D. ‘Killing Mary to Save Jodie: Conjoined Twins and Individual Rights’ (2001) 21 (1) *Philosophy & Public Policy Quarterly* pp. 9-14



death of another. In the language of all of the judges we identify the rhetoric of disaster, threat and danger which can only be overcome through violence against Mary. This rhetoric of violence makes clear the boundaries identified as being those of principled liberalism. Theorisations of the ‘moral community’ of mutually respectful and rational agents,<sup>41</sup> institutionalised in law through human rights principles, all suggest that there is no claim to continued life enforceable on Mary’s behalf. If Mary does have an interest in continued life, it can be rightly ignored because her lack of personhood and the violence she commits simply existing locates her outside of the liberal moral universe.<sup>42</sup>

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<sup>41</sup> The universal community that Kant describes as the “Kingdom of Ends”, see Kant, *Groundwork of the Metaphysics of Morals*, Gregor, M. (ed.) Intro. Korsgaard, C.M. (Cambridge: Cambridge University Press, 1998) p.41/s.4:433

<sup>42</sup> In a controversial argument, Agamben suggests that the determination of the value and non-value of life illustrates a certain contiguity between liberal and totalitarianism (Agamben (1998) *supra*, n.1, p. 120-1). Posing the question as to why the Nazis found it necessary to implement a programme of extermination of the incurably ill in 1940-1 when it was not in their economic interests to do so, Agamben regards that the answer lies in the politicisation of human life, and its inscription into the state (*ibid.*, pp. 140-1). The determination of the value of lives – even according to a supposedly life-affirming right to life as is the case in *Re A* – demonstrates for Agamben the foundations for descending into totalitarianism, in which such determinations are political decisions and hence the site of sovereign power (*ibid.*, p. 122, p. 140).

## 2.2 *The Limits of Post-metaphysical Liberalism*

If modern discourse of human rights in law finds grounding in a Kantian idea of the person it should not be surprising that the Court of Appeal found the “medical treatment” to be consistent with the Human Rights Act 1998, despite the fact that it appears to involve bringing about death with *Woollin* intention.<sup>43</sup> As we have seen, the commitment to an idea of personhood in liberal theory determines that notions of justice involve certain conditions for inclusion. This section examines the attempts by modern liberals to preserve Kant’s commitment to the universal by discarding his metaphysics of the person. In providing what they describe as a “political” (Rawls) or “discursive” (Habermas) basis for general principles,<sup>44</sup> post-metaphysical liberalism cannot escape the problem that principled justification is premised on presuppositions as to human identity and as such reveal its logical limits when it encounters a subject that does not share this identity. Picking up a thread from ss. 3.1.3, 3.1.4 and 5 in Chapter One, the following sub-sections argue that the ‘person’ is both the foundation and the limitation in Rawls and Habermas, as in Kant, since it determines who is inside and who is outside moral reach.

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<sup>43</sup> *R v Woollin* [1999] 1 AC 82 at 96: “Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen.”

<sup>44</sup> Rawls (1996) *supra*, n.28, p.374



### 2.2.1 Rawls's Justice as Fairness – The Conditions for Inclusion Within the Two Principles of Justice

Like Kant's metaphysics, 'justice as fairness' finds its limit in Rawls's conception of the person. The issue is his assertion that 'liberty' means the *opportunity to express one's moral powers* and it is on the basis that each person is assumed to have these moral powers that the primary goods are distributed. In the case of *Re A*, where the moral powers and all possibility of developing them are lacking in Mary, we seem to be in a similar situation to our analysis of Kant's end-in-itself. Mary's draining dependence upon her sister and primitive mental capacity means that she would always lack both reasonableness and rationality. There is little in the *Theory* that allows the parties in the original position to consider those who have no potential for developing in a mental or ethical sense, since Rawlsian justice depends upon the assumption that people can take care of their own personal and moral lives. Rawls has stated that 'hard cases' involving parties lacking the two moral powers should be set aside in deciding questions of justice. In the *Theory* he remarks:

“The only contingency which is decisive is that of having or not having the capacity for a sense of justice. By giving justice to those who can give justice in return, the principle of reciprocity is fulfilled at the highest level.”<sup>45</sup>

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<sup>45</sup> Rawls, J. *A Theory of Justice* (Oxford: Oxford University Press, 1999) p.447

In a tacit acceptance that his conception of justice is not competent to do justice to parties such as Mary, Rawls argues further that “hard cases distract our moral perception by leading us to think of people distant from us whose fate arouses pity and anxiety”.<sup>46</sup> The best he seems to offer is paternalism built into the conditions of the original position. Parties in the original position may “adopt principles stipulating when others are authorized to act in their behalf and to override their present wishes if necessary”.<sup>47</sup> This, of course, is feeble in the sense that it does not offer any shift of perspective or attempt to incorporate the very problematic question of a necessarily inarticulable and fundamentally unreasonable demand to be allowed to live. Perhaps it would be asking too much of a theory such as Rawls’s, which depends for its persuasive force upon an appeal to the idea of persons as morally developing beings, which Mary is not. The moral powers are necessary to Rawls’s project since otherwise the parties in the original position would not have any way of deciding in favour of one principle over another. Consideration of the moral powers is necessary to morally distinguish humans from, say, animals. We cannot, then, modify the conditions of the original position in such a way that would allow someone like Mary to be adequately considered. In making the two moral powers the immovable foundation of reasoning from behind the veil of ignorance, Mary is effectively left without representation in the original position. Having no representative in this sense, she occupies a moral space exterior to the principles of justice. She is simply one of those ‘hard cases’ that can only be set aside when considering the larger picture. In giving nothing in terms of her inability to enter into contractarian moral reasoning, she is likewise given nothing

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<sup>46</sup> Rawls, J. ‘A Kantian Conception of Equality’ (1975) *Cambridge Review*, pp. 94 - 99, p.96

<sup>47</sup> Rawls (1999) *supra*, n.45, p.219



in return. This contrasts with Jodie's relative potential for developing the two moral powers once separated from Mary.

Thinking of *Re A* in the context of Rawls's justice as fairness seems to allow that the parties in the original position do not consider Mary's claim to a continued life. If, as Rawls argues in *Political Liberalism*, the veil of ignorance is thick enough to allow knowledge of only the conception of the free and equal person, then she is morally invisible. One could say that the operation is justified in the negative sense that there is nothing perceptibly wrong in killing someone who has no moral standing anyway. If such reasoning does not completely satisfy then we must resort to emphasising, as the Court of Appeal did in *Re A*, the beneficial consequences of the operation. That is the effect of the comments of Brooke LJ, when he uses his analogy of the scales in defending his use of the defence of necessity. There are, of course, meaningful differences between Rawls and Kant, but as a theory of principled justification, Rawlsian reasonableness produces an effect similar to Kantian rationality. For Rawls, a beings that are incapable of considering anyone other than themselves are fundamentally unreasonable. Kant would describe such beings as irrational and heteronomous. They would fall short of what is expected from persons fully integrated into the moral community and worthy of the moral consideration of others.

Other commentators have suggested ways in which Rawls can be read in order to bring the morally incompetent within the realm of justice. Martin argues that incorporation of the mentally handicapped into justice as fairness requires in the first place a reinterpretation of the maximin principle that the primary goods are to be distributed for the benefit of the least advantaged. If we accept that the most well-off do not 'deserve' their arbitrarily birth-given talents, we might also suppose

that the mentally disabled do not deserve their disadvantage. Looked at like this, the morally incompetent must be regarded, not as excluded altogether from justice as fairness, but as part of the ‘least advantaged’ class for whom an adequate scheme of liberties and social and economic goods must be provided.<sup>48</sup> Amartya Sen suggests that Rawls’s scheme is made unnecessarily tunnel-visioned by focusing upon the least-advantaged simply having the primary goods. Since the veil of ignorance prevents the parties in the original position from taking particular disabilities into consideration, the mere fact of having a certain scheme of goods does not ensure that each person’s basic needs are met. Sen therefore suggests a shift from a measure of equality in having the primary goods to equality of their *effect*. In other words, we ask not whether the worst-off have an adequate scheme of liberty and other goods, but whether these are sufficient to bring about a tolerable level of capability.<sup>49</sup> Both Martin’s and Sen’s arguments must still deal with the problem that for Rawls ‘liberty’ is guaranteed *because* it is necessary to promote persons’ essential moral powers, which the morally incompetent lack. Sen’s proposal has the further problem that its focus on the effect of the primary goods runs counter to the purpose of the veil of ignorance. To encumber the parties of the original position with consideration of providing a substantive “basic capability”<sup>50</sup> means that the veil would have to be at least partially removed to allow them to view the effects of

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<sup>48</sup> Martin, R. *Rawls and Rights* (Lawrence, Kan.: University Press of Kansas: 1985) p.189. For others, Rawls’s attempt to mitigate inequalities contradicts his prioritisation of Kantian individualism over community: see Sandel, M.J. *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) p.138, p.147

<sup>49</sup> Sen, A. *Choice, Welfare and Measurement* (Cambridge, Mass.: Harvard University Press, 1998)

<sup>50</sup> *Ibid.*, p.368



their distributive decisions. This would of course endanger the vital principle of objectivity.

For political liberalism to be universally inclusive it must be assumed that all parties involved in a conflict have the capacity to consider the other's propositions in relation to their own self-conception as free and equal. Conceptions of justice are justified on the basis of reasons that are publicly and universally recognised by free and equal citizens.<sup>51</sup> It is possible that the fact that Mary has no such a self-conception (and no possibility of such in the future) could mean that the decision in *Re A* does not in fact need any justification. Mary need not be offered terms of cooperation because she is incapable of considering them or offering any in return. Even if she were mentally and verbally capable, the physical threat that her very existence causes for Jodie means she could never offer reasonable terms to her potentially rational and reasonable sister.

### 2.2.2 The Conditions of Membership of Habermas's Ideal Speech Community

Reintroducing Habermas to the discussion, the problems associated with rational justification derived from participation in discourse must be addressed. For Habermas, according others moral regard necessarily involves a communicative encounter in which subjective needs can be heard and understood. The implication of this is that, without the opportunity for a communicative exchange we cannot have moral regard for the other and the other has no reason to have such a regard for us.

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<sup>51</sup> Rawls, J. 'The Idea of Public Reason Revisited' in *Law of People* (Cambridge, Mass.: Harvard University Press, 1999a) p.131, pp.133-4, p.155

Recall that Habermas argues that the language of rights embodies the ideals of freedom and equality in that they apply to everyone equally in promoting freedom to participate in public affairs. Habermas claims that through using the mediating language of rights, all people will be able to make themselves understood to a universal audience. Subjective claims, in all their diversity find harmony with universality through the common mediating language of rights.<sup>52</sup> But whose rationality is this and precisely whose self-conception does it represent? A distinctly modernist project, Habermas's Kantian-Hegelian-Kohlbergian rationality does lay itself open to charges of Eurocentricism and gender/race bias which threatens to undermine his claims to objectivity and universality.<sup>53</sup> Such criticism does pose a serious challenge to Habermas's communicative rationality. However, my interest in Habermas focuses upon the less ambitious question of the applicability of communicative competence in a situation such as *Re A*, in which the possibility of any communication is problematic.

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<sup>52</sup> Habermas, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law* (Cambridge: Polity Press, 1996) p.56

<sup>53</sup> Adding to a wider critical debate, in which Habermas is derided for selling his particular communicative paradigm as a discovery of universal rational communicative presuppositions, feminist commentators have argued that communicative reason effectively excludes sexual difference. Dean, J. ('Discourse in Different Voices' in Meehan, J. (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (London: Routledge, 1995), p.205) for instance, points out that the model of moral consciousness that Habermas uses for his communicative action ignores the female experience. As far as Dean's critique is concerned, Habermas has failed to address the criticisms of liberal moral theory by feminists such as Gilligan that the notion of reasonableness and rationality in law is a male one. Of course, accusations of particularism are precisely the kind of criticism that Habermas has striven to avoid by detaching morality from all cultural and historical context and reliance upon communicative rationality.



*Re A* illustrates the two-fold problem suffered by Habermas in situations involving someone who does not fit easily into liberalism's conception of the person. Habermas wants to ensure that every person affected has an equal chance to have their say, and that this is translatable into the language of rights. What claim, therefore, is made by Mary, and how is it to be so translated into language that is true both to her self-conception and to liberal democratic ideals? Having no ability to communicate her desires, Mary's 'claim' is for others to decide. Jodie's claim must be similarly constructed from without. In the High Court, Mary's life was judged to involve only pain and suffering, and hence of no worth to her. In the Court of Appeal, only Robert Walker LJ agreed, stating that Mary's wishes (and hence best interests) were that she be put out of her misery.<sup>54</sup> This is a highly convenient view of her wishes, considering the beneficial consequences that Mary's death would have for Jodie's survival chances. The majority of the Court of Appeal rejected this reasoning as infringing a right to life, and reconstructed her as making a claim to live in competition with her sister. This step allows the court to then consider the arguments for and against the operation without infringing Mary's right to life. Thus Ward LJ and Robert Walker LJ used criminal defence reasoning and Brooke LJ used his version of an 'identification for death' test. Because of the threat that Mary poses to Jodie and because she represents an obstacle to Jodie's survival, her subjective claim to remain attached to her sister cannot be universalised. Mary's claim, so constructed, cannot find rational justification because it is in direct conflict with a stronger claim. My problem with this approach is that the analysis that Habermas would apply – that *Re A* is an example of a subjective claim being rationally unjustifiable – is a perverse reading of the

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<sup>54</sup> *Re A*, *supra*, n.2, per Robert-Walker LJ, p. 1069

situation. Neither Mary's nor Jodie's 'claims' come from their subjective viewpoints. They are imposed by a legal framework that can only regard its subjects as separate individuals with conflicting interests. Hence this is not a case of an attempt to harmonise subjective claims with objective rationality, but merely a weighing up of two conflicting liberal constructs. A decision can only be considered justified, therefore, if all of the parties involved can make their own claims and identify themselves with Habermas's conception of the individual language-user. Habermas's communicative rationality must individuate Jodie and Mary and be construed as having conflicting individual claims, because after a certain length of time they would be physically incompatible. Therefore they must be accorded equality to put their separate cases and being the only one with a chance of survival after that time, Jodie's case wins. But this is exactly where the problem lies. 'Equality' in a case like this has no normative force at all. There is simply no way in which Mary's and Jodie's claims, heard as separate demands to live, can be regarded equally. Given this impossibility in ensuring equality between Mary and Jodie, is rational justification of a decision on their separation possible using communicative action?

Habermas has written little on such a situation, but in *Justification and Application* he does suggest a way that beings lacking the linguistic capacity for rational argumentation might nevertheless be incorporated into the communicative theory of justification. On the topic of animal welfare Habermas asks: how can a moral position towards animals be adopted?<sup>55</sup> Surely, since the adoption of a 'moral position' is based upon a communicative encounter, translatable into a commonly accessible language of rights, this is impossible. However, Habermas is determined

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<sup>55</sup> Habermas, J. *Justification and Application* (Cambridge: Polity Press, 1993) p. 105-6



to see off this criticism. He insists that a moral position towards animals (and hence presumably other non-language-using sentient beings) is possible through “extra-linguistic” communication. When we encounter animals and adopt a “performative attitude” towards them, we take on a “quasi-moral” responsibility.<sup>56</sup> Apparently this responsibility arises from our recognition (through the encounter) that animals need our protection. It is not a symmetrical relationship since the same attitude cannot be required of the animal, but is nevertheless an appeal to inter-subjectivity – the touchstone of Habermas’s moral theory.

Clearly, this is a radical extension of the original discourse ethical theory and requires much further development to reconcile it with the basic idea of the essential presuppositions of rational discourse as the basis for moral theory. I think that accepting this early development of the theory to include others may demand that a rather flexible attitude be taken towards the foundational aspects of communicative reason. If we are to accept that a moral position is taken on the basis of the kinds of basic communication we have with animals then what role is there after all for the hitherto essential premises of rational discourse necessary for validity? Indeed, what about the conditions of equality, sincerity, truthfulness, and shared linguistic meanings, which Habermas has hitherto insisted upon as being necessarily presupposed by all participants? Are these to be replaced with different presuppositions where the relationship is non-symmetrical, and does this imply that there may be several different sets of presuppositions to cater for the various degrees of communicative competence? In order to make use of it we need to know more about what Habermas means by terms such as ‘extra-linguistic encounter’ and what the precise difference is between this and an encounter which does not found a

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<sup>56</sup> *Ibid.*, p.110

basis for an inter-subjective moral position. Habermas is wise to describe these remarks on animal welfare as ‘quasi’ moral since, on his own definition, a moral position can only be adopted by accepting what he argues are the unavoidably and universally presupposed conditions of communication.<sup>57</sup> If nothing else, Habermas’s concern with a question that cannot be moral in that sense is refreshing and suggests that his interest in normativity is more complex than the harmonisation of life-world and the universal in standardised language. Habermas seems to be indicating that there are legitimate questions of normativity that are beyond universal morality, and that these can only be addressed through the more modest strategies of *ethics*. This suggests that in cases such as *Re A*, whilst we cannot be ‘moral’ we still have a duty to be ‘ethical’. The speeches of the three judges of the Court of Appeal can be read in this light: as recognising that Mary may be making a claim and yet being unable to respond to or protect it in a practical sense.

We must remember that the principle of discourse ethics is that a moral position is achieved by transcending one’s particular context. Through shared recourse to a communicative mediator, we recognise the other whom we encounter as having a claim that we should take seriously. It is the possibility of communication itself, then, which provides the stepping stone between Self and Other, between local and universal, between subjective and objective. Hence it is important that we understand exactly how extra-linguistic communication serves to found a ‘quasi’ moral position, and what place such a position has with regard to an ‘ethical’ one and a ‘moral’ one. The information that Habermas gives us does not allow us to confidently make such assessments. This shift towards the ‘extra-

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<sup>57</sup> See Chapter One, s. 2.4., *supra*.



linguistic' in Habermas's work is interesting because it hints that Habermas might accept that justice and the moral viewpoint cannot be entirely rationalised in terms of universal communicative inter-action. Unlike Rawls's paternalism, these remarks of Habermas show a certain willingness to respond to the limitations of his larger rationalistic theory. Universal conceptions of equality and freedom can be liberating and emancipating, and liberal theorists strive to show how and why this is so. However, as I have sought to argue here, this is not necessarily the case.

### **3. The Responsible Individual: Discourses of Justification in Punishment Judgments**

As seen in Chapter Two, the liberal principled justification of punishment is retrospective and retributivist: does the offender deserve to be punished and if so, how harshly? From this perspective, *Hindley* and *Re Thompson and Another* respectively represent opposite ends of the tariff spectrum. At one end there is the criminal whose responsibility for her crime is so fully accepted that the House of Lords feels justified in upholding a whole life tariff. At the other end are two criminals who are felt to have lacked the necessary level of moral maturity to be held fully responsible for their crime. In both cases, the prisoners claimed that they were not fully responsible for their crime, but only in Thompson and Venables' case was this claim taken seriously. Why should this be? The apparently obvious answer (which this chapter rejects) is that the principle of retributivism can apply to Hindley and not to Thompson and Venables because, as children in 1993, the latter can be regarded as having lacked the requisite responsibility. As an adult in 1966,

Hindley is held to have been fully responsible for her crime. In liberal theoretical terms we would therefore describe her as being held to account as a fully rational agent: capable of considering the interests of others and acting upon universal maxims. In Hegel's terms her harsh punishment reunites Hindley with Reason and gives to her what the rational part of her always wanted. From this perspective, justice is done to and for Myra Hindley, but on account of their young age in 1993, Thompson and Venables' case cannot be decided as a matter of retributivist justice. Zimring suggests that there are good reasons for taking such a view, contending that children are "accident-prone by design" and as such are properly treated as less culpable.<sup>58</sup> Although a child of ten years can be held to account for criminal acts, the idea that there is a principled distinction to be made between adult and child murderers finds plenty of legal authority. For example, in considering reasons for their release, Lord Woolf described Thompson and Venables being only ten years old in 1993 as an "overriding mitigating factor".<sup>59</sup> On the other hand, according to the House of Lords the twenty-two year old Myra Hindley "knew what she was doing". Her role in the murders and tortures was "pivotal" and without her involvement two of the victims "would still be alive today".<sup>60</sup> In accordance with retributivism's retrospective view, these comments all refer to the degree of responsibility and moral development at the time the crimes were committed. It might appear that the cases can be explained purely in a retrospective manner, and a doctrinal retributivist critique would seek to show this. On this view, such matters

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<sup>58</sup> Zimring, F. E. 'Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity and Diminished Responsibility' in Grisso, T. and Schwartz, R. G. *Youth on Trial: A Developmental Perspective on Juvenile Justice* (Chicago: University of Chicago Press, 2000) pp. 271-89 p.283

<sup>59</sup> *Re Thompson and Another (Tariff Recommendations)* [2001] 1 All ER 737, p. 740

<sup>60</sup> *R v. Secretary of State For the Home Department, ex parte Hindley* [2000] 2 All ER 385, p. 392



as reform of the criminal whilst in prison do not constitute punishment itself or its justification but are simply its side-effects.<sup>61</sup> Indeed in Hindley's case, considerations of reform were given very little attention by either Court of Appeal or House of Lords in deciding upon the reasonableness of the whole life tariff and this bolsters the idea that, unlike Thompson and Venables, her tariff is determined retributively.

The case law also suggests that the correct considerations for measuring the requirements of retribution are different as between adults and children. In *Hindley*, the House of Lords uncritically and unanimously accepted that the requirements of retribution were not fulfilled prior to Myra Hindley's death. There is no question raised as to whether the Home Secretary was influenced by inappropriate factors. In *ex parte Thompson* on the other hand, the fact that the Home Secretary's tariff decision had been influenced by various petitions demanding that life sentence be imposed upon the juvenile criminals<sup>62</sup> was considered by the majority of the House of Lords (and also the Court of Appeal) to be inappropriate.<sup>63</sup> It is also possible to find legal authority for a distinction in the general purpose of punishing adults and children. For instance, the ruling by the House of Lords in *Hindley* that 'life imprisonment' can equate to a prisoner's whole life implies that sentencing under the Murder (Abolition of Death Penalty) Act 1965 is primarily punitive, rather than rehabilitative. In contrast to this, the Children and Young Persons Act 1933 states

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<sup>61</sup> Mabbot, J. D. 'Punishment' in Acton, H.B. *The Philosophy of Punishment: A Collection of Papers* (London: Macmillan, 1969) p. 40

<sup>62</sup> Including 21,000 coupons received by *The Sun* newspaper from its readers demanding that "Bulger killers must rot in jail"

<sup>63</sup> *R v. Secretary of State For the Home Department, ex parte Thompson* [1998] AC 407 per Lord Steyn, p. 525-6

that a person sentenced under this legislation<sup>64</sup> shall not be given life imprisonment or the death penalty<sup>65</sup> but instead shall be sentenced to remain in jail ‘at her Majesty’s pleasure’.<sup>66</sup> The majority of the House of Lords in *ex parte Thompson* considered that this distinction was an implied recognition of the special status of children as morally developing beings. Lord Browne-Wilkinson stated that Home Office policy towards a child murderer’s tariff should take into account the fact that children have an ability to mature and develop with a rapidity and comprehensiveness that is very unlikely in an adult.<sup>67</sup>

The key to locating these legal observations within liberal moral theory is that it all rests upon an assumption that children are to be regarded as less responsible and therefore less culpable than adults. However, to attempt to explain the differential treatment of the two cases purely retrospectively is overly simplistic in my view. The House of Lords and Court of Appeal in *ex parte Thompson* both unanimously agreed that the sentencing under the 1933 Act combines elements of both punishment and welfare, retaining an element of “tension”<sup>68</sup> as to the precise grounds for upholding or amending a tariff. On the issue of the correct method of measuring the requirements of retribution, Lord Steyn draws a distinction between “informed public interest” which can be taken into consideration by a Home Secretary and “public clamour” which cannot.<sup>69</sup> However, no such scrutiny was

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<sup>64</sup> Applies to persons between the ages of ten and seventeen who are convicted of murder, per s 16.

<sup>65</sup> s. 53(1)

<sup>66</sup> McDiarmid, C. ‘Children Who Murder: What is Her Majesty’s Pleasure?’ (2000) *Crim LR* pp. 547-563

<sup>67</sup> *ex parte Thompson, supra*, n.63, p. 500

<sup>68</sup> McDiarmid (2000) *supra*, n.66, p.555

<sup>69</sup> *ex parte Thompson, supra*, n.63, per Lord Steyn, p. 525



made regarding the basis for the Home Secretary's decision as to Myra Hindley. Why not? The distinction that Lord Steyn draws would be understandable from a principled perspective if it were made on the basis of the moral difference between adults and children. But his remarks in *Thompson and Venables*' case are actually based on the broader foundation of the constitutional separation of powers – that in setting tariffs the Home Secretary must act as a judge and not as a politician. The implication seems to be that it is fine for the Home Secretary to act as a politician in Hindley's case. But the failure to support this distinction with reference to the types of offender suggests a more problematic relationship between an offender's age and the appropriate tariff than simply that she was a twenty-two year old woman rather than a ten year-old boy when she committed her crimes.

On a different point, Lord Lloyd's dissenting judgment in *ex parte Thompson* rejects the majority view that legislation provides a distinction between adult and child murderers. Lord Lloyd finds that s 43 (1) and (3) of the Criminal Justice Act 1991 applies the same conditions of release (detailed in s 33 and 35(1)) to both types of murderers. Thus, both adults and children forfeit their liberty for the rest of their lives insofar as a Home Secretary can recall both to prison once released.<sup>70</sup> For Lord Lloyd, the use of the phrase 'at Her Majesty's Pleasure' in the Children and Young Persons Act 1933 does not signify a meaningful, principled distinction between adults and children, but merely an "unfortunate... archai[sm]".<sup>71</sup> What is interesting here is that, like the majority of the House of Lords and Court of Appeal, Lord Lloyd could have interpreted the language of the 1933 Act in accordance with the principle that a moral distinction *should* be made

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<sup>70</sup> *Ibid.*, per Lord Lloyd, p. 511

<sup>71</sup> *Ibid.*, p. 514

between children and adults. That he chose not to do so indicates that this distinction is perhaps not so obvious and that there is indeed a degree of tension on this issue. In what seems to be at least in part a vindication of Lord Lloyd's position, the procedure for setting the minimum term of child offenders has recently been brought into line with the rules for adults sentenced to a discretionary and automatic life sentence by s 60 of the Criminal Justice and Court Services Act 2000 and s 28(5) of the Powers of Criminal Courts (Sentencing) Act 2000.<sup>72</sup>

What I hope these comments are drawing attention to is the inadequacy of a retrospective, retributivist explanation of tariff policy. This chapter will now develop the argument by identifying the contingency at the heart of the retributivist principle. The argument made here is that, as a moral narrative, the cases of *Hindley* and *Re Thompson and Another* display the importance of consequentialist reasons in supplementing (and thereby making meaningful) a judgment of retributivist principle. The judgments in *Hindley* and *Re Thompson and Another* read together suggest that given a different set of surrounding circumstances in the year 2000, the ages of criminals at the time at which they committed their crimes would have been regarded very differently. Like other fables in which moral lessons are learned or scores justly settled, the coherence of the narrative of criminal responsibility derives from its power to appeal to a certain moral sense. This means that from a purely retributive perspective the narrative is actually incoherent, apparently confusing retrospective with prospective judgments. But this is precisely the incoherence that is necessary for judgments of 'principle' to be made with any persuasive effect. Even if one were to adopt the quasi-religious liberal confidence (such as Kant's) in the power of deontological principle to stand

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<sup>72</sup> Practice Direction (Criminal: Consolidated) [2002] 3 All ER 904, para 49.21.



alone, the current legal position in which children from the age of ten are accredited with an ill-defined level of moral autonomy presents us with the problem of deciding whether in fact we can find full culpability in a particular offender. In deciding this point, one's perspective on the cases necessarily ceases to be purely retrospective.

In order to be satisfied that upholding the whole life tariff in Hindley's case is justified in principle, it is necessary to examine the reasons why the judges felt that she should be held to carry so high a responsibility as compared to Thompson and Venables. To the argument that Hindley's sentence is disproportionate given her age and influence by Brady in 1966, Lord Steyn replied that, to the contrary, the crimes committed by her and Brady were "uniquely evil"<sup>73</sup> even compared to other murders. A crime that is not merely evil but *uniquely* so implies an exceptionally high degree of malice and wickedness on the part of the criminal herself, but in what sense can Hindley or her crime be described in these terms? Would such a description be appropriate no matter what the circumstances at the time of her possible release? It is unfortunate that Lord Steyn does not explain what he means by his characterisation of Hindley, although upon a little reflection this is clearly no mystery. He would find it difficult to do so without compromising his 'principled' position, because even a summary examination of other whole lifers reveals that the evilness of Hindley's crime is not, in fact, unique. There are many examples of gross and shocking cruelty amongst those serving life sentences for murder, against whom Hindley looks decidedly ordinary. The crimes with which she was eventually

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<sup>73</sup> *Hindley, supra*, n.60, per Lord Steyn, p. 392

found to have been involved<sup>74</sup> are not incomparable to other cases. Take for instance Dennis Nilsen, who was jailed in 1983 for six murders and two attempted murders, having killed and dismembered 15 gay men; or Colin Ireland who tortured and murdered five gay men in 1993 after making a new year's resolution to become a serial killer. Consider Victor Castigador, who in 1985 doused three bank workers with white spirit, locked them in a cage and threw in lit matches.<sup>75</sup> Apparently, Hindley's case is unique even compared to such murderers. But on what basis? That she is a woman who killed children?<sup>76</sup> That her crime happened to attract a more lasting anger and revulsion than these others listed?<sup>77</sup> These are possible explanations for the rhetorical turn and for the judgment as a whole. However, Lord Steyn allows his assertion that Myra Hindley is a unique case, to remain enigmatic.

I do not wish to add my own speculation to the critical literature on these points specifically. However, there is one very major difference between Hindley on the one hand, and Thompson and Venables on the other, which illustrates the importance of consequentialism in decisions of retributivist principle. The difference is that, unlike Thompson and Venables, there are no compelling reasons why

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<sup>74</sup> Five murders, two for which Hindley was convicted in 1966, and the others she confessed to being involved with in later years (see Chapter Three, s.2.1., *supra*).

<sup>75</sup> Upton, J. 'The prisoners who will never be released' *The Guardian*, January 31 2001, <http://society.guardian.co.uk/crimeandpunishment/story/0,8150,431436,00.html>

<sup>76</sup> For discussion on characterisations of female offenders, see Heidensohn, F. 'Women and Crime: Questions for Criminology' in Carlen, P. and Worrall, A. (ed.) *Gender, Crime and Justice* (Milton Keynes and Philadelphia: Open University Press, 1987) pp. 16-27. For commentary on the differential treatment of men and women in the context of infanticide, see Wilczynski, A. 'Mad or Bad? Child-killers, Gender and the Courts' (1997) 37 (3) *British Journal of Criminology* pp. 419-436

<sup>77</sup> Shute, S. 'The Place of Public Opinion in Sentencing Law' (1998) *Crim LR* 465-77



Hindley's release would serve any practical purpose as regards living a useful, reformed life. Whether a shameful act can be construed as effectively bringing an end to the offender's freedom or serving as useful moral lesson for future contemplation is determined by such factors. Consider, for example the parable of the Prodigal Son.<sup>78</sup> This New Testament story demonstrates the moral force of the rhetoric of youth, which it shares with the narrative qualities of *Hindley* and *Re Thompson and Another*. The parable concerns two sons who make very different life choices. The older brother lives virtuously and works diligently for his father whilst the younger goes off to spend all of his inheritance on extravagant debauchery. When the young son has wasted all his money and is forced to return home destitute and utterly ashamed, the story delivers its moral message through the contrasting attitudes of the father and of the older son. "Hurry!" called out his father to the servants, 'fetch the best clothes and put them on him! Put a ring on his finger and shoes on his feet, and get that fatted calf and kill it, and we will have a feast and a celebration!'.<sup>79</sup> The older son, naturally enough, feels aggrieved. In what can only be understood as an appeal to retributive justice, he furiously says to his father:

"Look, how many years have I slaved for you and never disobeyed a single order of yours, and yet you have never given me so much as a young goat so that I could give my friends a

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<sup>78</sup> Luke 15:11-31

<sup>79</sup> *Ibid.*, 15:22-3

dinner. But when this son of yours arrives, who has spent all your money on prostitutes, for him you kill the fatted calf!”<sup>80</sup>

Aside from the moral messages that sincere repentance and forgiveness are more important than righteousness and punishment, what is significant here is the rhetorical force of the identities of the protagonists with respect to the repentance. Why is it the younger rather than the older son that experiences this dramatic change of heart? If the story is to succeed as a moral lesson it is important that its readers are not appalled at the father’s decision. Surely the older son’s indignation is understandable: a wrong has been committed and now stands in need of correction. The aggrieved older son might also wonder what reason there might now be to respect authority and obey the law when those that do not are simply forgiven? As the communicative retributivists claim, it is right in itself to respond with condemnation and sanction to those to break the law, which the offender must be brought to accept. Punishment as retribution can only be justifiably avoided if, as argued above, the offender is retrospectively considered not to have been responsible for their crime. Surely if, as appears to be the case, the younger son is a responsible agent he should be treated as such by being held to account. However, the determination of such responsibility is not a purely retrospective matter: it necessarily involves the consideration of what use an offender could make of future freedom. Therefore, the reason why we can understand the father’s decision to set aside his older son’s indignation is the fact that the prodigal son has repented his wicked ways with plenty of time to live a useful, reformed life. It is more difficult to sympathise with one whose repentance or claim not to have been fully

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<sup>80</sup> *Ibid.*, 15:30



responsible for a past shame, is made when the end is imminent. It is true that this is not the point of the story. The Prodigal Son teaches us that, as a matter of principle it is better to forgive than to punish the truly repentant. But the principle is not in fact pure: within it lurks an unprincipled calculation of consequences, represented by the boy's youth. A morally judging audience needs to be provided with a good reason to take repentance seriously. In the rhetoric of moral fable, 'youth' is a good reason and 'old age' is not. Consider old Fagin's trial in Dickens's *Oliver Twist*:

"...He was asked if he had anything to say why sentence of death should not be passed on him. ... He only muttered that he was an old man – an old man – an old man – and so, dropping into a whisper, was silent again."<sup>81</sup>

Fagin knows that his plea is a feeble one, and predictably it fails to save him from the gallows. Retributivists who have turned their attention to the question of juvenile responsibility accept that youth is an important factor in determining the appropriate punishment, but not necessarily because the offender was *in fact* too young to be held responsible for his act. Andrew von Hirsch argues that we feel more tolerant towards juveniles who offend because we accept that moral responsibility is learned from experience: by 'testing the limits' and making mistakes.<sup>82</sup> Juveniles are treated differently to adults, not because we believe them

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<sup>81</sup> Dickens, C. *Oliver Twist* (London: Penguin World Classics, 1982) p. 340

<sup>82</sup> Hirsch, A von. 'Proportionate Sentences for Juveniles: How Different Than for Adults?' (2001) 3 (2) *P&S* pp.221-236, p.225

to lack responsibility for their actions, but because we wish to encourage rather than stunt their growth as autonomous beings.<sup>83</sup> The progress that a particular offender has made towards attaining this ideal is less significant than the possibility of demonstrating a practical use for it upon release.

Consider the rhetoric of the judgments in *Hindley* and *Re Thompson and Another* in the light of these narratives. The facts of Hindley's case do not set her apart as unique amongst murderers. Rather, the fact that Lord Steyn's judgment acts as a test case for the other 'whole lifers', some of whom are mentioned above, indicates that the phrase 'uniquely evil' signifies *similarity* of type between Hindley and these others, as prisoners whose release, like Fagin's, would serve no practical purpose. This distinguishes all of these from those such as Thompson and Venables, for whom release would be practically useful. There are good reasons for wanting to keep certain 'whole lifers' in jail as long as possible, not only because of requirements of retribution, but also because of considerations of deterrence, lack of potential for future reform and protection of the innocent. Therefore we begin to recognise Lord Steyn's rhetoric, not as a retributive justification based on Hindley's own responsibility at the age of twenty-two, but as signifying a distinction from cases where release would bring practical benefits. As seen above, Lord Woolf is explicit that the young age of the boys in 1993 is a crucial factor in justifying their release. Following this logic, the importance attached by Lord Woolf to the boys' age in 1993 refers to a combination of conditions in which there are good reasons to retrospectively *assume* that they were not fully responsible for their crime. The possible counter-factuality of retributivism's compromise with consequentialism in judicial moral narrative is identified as an ethical necessity by Weijers, who

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<sup>83</sup> *Ibid.*, p. 232



contends conversely that, even though juveniles are probably not entirely responsible for their acts they ought to be treated *as if* they are, in order to help them to develop their sense of responsibility.<sup>84</sup>

If this analysis is correct, it would seem that the ‘retributive’ aspect of punishment is in many ways secondary to the practical aim that a criminal should, if possible, be eventually reintegrated with his community. The justification of Hindley’s whole life tariff lies in the perceived hopelessness of any such reintegration, whilst Thompson and Venables’ release is justified because this does seem possible, albeit with the help of protected identities. Of course, we should be wary of reading an equivalent narrative into legal judgment and biblical parable, being as they are two distinct discourses. It could be argued, for instance, that the parable has little to do with punishment as understand here: the shameful behaviour of the prodigal son is after all only a moral rather than a criminal wrong. Therefore, unlike our legal examples, there is no public significance in the boy’s actions and thus no wrong can be committed in failing to punish him. However, there are comparisons to be drawn between the legal judgments and the biblical parable in terms of the considerations brought to the task of interpreting responsibility retrospectively. The returning son has nothing to prove except his sincere repentance in order for his father to construe his hitherto ignoble life as one worth redeeming. Similarly, Thompson and Venables have nothing further to prove to convince Lord Woolf that they should be regarded as too young in 1993 to be considered sufficiently responsible for their crime. It is the boys’ youthfulness in 2001 that allows Lord Woolf to regard their disgrace as a moral lesson, from which

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<sup>84</sup> Weijers in Weijers, I. and Duff, R. A. (ed.), *Punishing Juveniles: Principle and Critique* (Oxford: Hart Publishing, 2002) p. 135-6

they have perhaps drawn in order to reform. Lord Woolf states that transferring Thompson and Venables to an adult prison would expose them to prison's "corrosive atmosphere" which "would be likely to undo much of the good work [reform] to which I have referred".<sup>85</sup> Given these dangers Lord Woolf is satisfied that "further detention would not serve any purpose".<sup>86</sup> Like the forgiving father keen not to waste what is left of a young man's life, Lord Woolf decides that the boys' detention has already served its purpose – that of preparing them for a law-abiding life outside of custody – and so construes them as being not fully responsible for their crime. In this light, other 'facts' take on a moral significance. The depths to which the errant son falls to before his return – having fallen into poverty he becomes so hungry that he even covets the food he is hired to give to pigs – can be retrospectively construed as being part of the punishment, reducing the necessity for further sanction. In *Re Thompson and Another* Lord Woolf refers to the guilt and shame clearly felt by the offenders as if it is itself part of their punishment. Similarly, on his return the prodigal son's genuine shame and repentance are made very clear to the father and even clearer to the reader.<sup>87</sup> On Duff's communicative perspective, in which proportionality of punishment is decided by considering the necessary amount for effectively bringing the offender to understand and repent his crime,<sup>88</sup> it can be argued that these young offenders have already been punished. Since this punishment has already achieved its aim, further hard treatment at the hands of the law/father would only have a deterrent

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<sup>85</sup> *Re Thompson and Another*, *supra*, n.59, p. 741

<sup>86</sup> *Ibid.*

<sup>87</sup> The same repentant passage appears twice in the space of three verses (18-21).

<sup>88</sup> Duff, R.A. 'Punishment, Communication and Community' in Matravers, M. *Punishment and Political Theory* (Oxford and Portland, Oregon: Hart Publishing, 1999) pp.48-68, p. 52



effect and thus be regarded as a consequentialist supplement to this.<sup>89</sup> However, the older son's fury at his father's apparently easy forgiveness is as understandable on a principled perspective as the tabloids' own disgust at Lord Woolf's apparently soft approach. Theories of communicative retributivism conceive punishment as a means through which the community can publicly express their condemnation and give reasons for a particular sentence, but it is fanciful to suppose that the bloodthirsty tabloid press would be moved by any reasons that are delivered from a welfarist or rehabilitative perspective. Regarded retrospectively, the prodigal son's knowingly reprehensible behaviour has brought shame on the family and he thus deserves to be treated accordingly. In the interests of maintaining the vital patriarchal order and restoring the rule of reason, his actions bring punishment as a corollary. The older brother gives all the right reasons (from a retributive perspective) as to why punishment of his brother is deserved. It is interesting that in responding to this the father gives no reasons of his own except that "this brother of yours was dead and is alive again".<sup>90</sup> But the father's failure to give sound retrospective reasons for his forgiveness does not undermine the justifiability of his decision any more than Lord Steyn's failure to explain his 'uniquely evil' remark. The father's heart is set because he knows his son can still make a useful contribution. Lord Steyn feels similarly disinclined to elaborate on his reasons: he knows that Myra Hindley's life is all but finished. In both instances the crucial consideration is prospective rather than retrospective.

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<sup>89</sup> Hirsch, A. von. 'Punishment, Penance and the State: A Reply to Duff' in Matravers, *Ibid.*, pp. 69-82, p. 70

<sup>90</sup> Luke 15:31

As in the parable, so in the courts, retributivist principle is constructed in the light of unprincipled, consequentialist factors, which provide reason for hope and forgiveness. In being spared the potentially destructive experience of adult prison, added to the granting of anonymity in the High Court, the fatted calf is surely killed for Thompson and Venables. In Hindley's case there is nothing to be gained from treating her own disgrace as an experience from which to draw a moral lesson. There is no possibility of a joyful homecoming in her case. Deeming that Hindley was in fact fully responsible for her crimes allows the question of her reform to be effectively ignored despite her submissions. Lord Steyn referred to it only in the future tense: as something that the Home Secretary would have to consider from time to time. This is not to say that Hindley had not in fact undergone reform whilst in jail. Crowther points to the fact of her becoming a Christian, showing remorse and behaving as a model prisoner in jail.<sup>91</sup> However, care must be taken in adopting a critical attitude towards this dismissal of her progress towards reform. John Upton argues that the whole life tariff represents a "wilful refusal to look at the real person and willingness instead to scream at the hideous shadow that he casts on the wall behind him."<sup>92</sup> Although critical of the whole life tariff on 'principle', Upton's comments actually support the idea that Hindley is a decision based on principle in the retributivist sense. It is precisely the 'hideous shadow' that that retributivism looks to in its retrospective view of criminal responsibility. Although the 'hideous shadow' of Myra Hindley the sadistic child-murderer looms large over the judgment of the House of Lords, it may not have done so if Hindley were still a young woman. Admittedly this does not accommodate what Upton might consider

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<sup>91</sup> Crowther, E. 'A Matter For Consideration' (1998) 162 (39) *JP* 770-771

<sup>92</sup> Upton, *supra*, n.75



to be the ‘real’ Myra Hindley in 2000, but given her iconic, almost mythic image in the popular imagination, it would be naïve to suppose that such a pre-political concept could have much significance.

If the identification of the ‘responsible’ criminal relies upon considerations external to those regarding moral capacity at the time of the crime, then where does this leave the idea of retributivism and its liberal individualistic foundation? The language of these judgments shows that it is wrong to regard the deontological and consequentialist discourses of justification as necessarily antagonistic. Likewise, the ground conceded by Rawls, Hart and Mabbot does not suggest that either discourse is more correct than the other. Rather, the justification of punishment is a more complex operation than either perspective can adequately accommodate on its own. The implication of this is that determining whether Thompson and Venables’ release or Hindley’s whole life tariff can be justified on principle is not a purely principled matter. If the argument that this chapter has tried to make is sound, then the choice as to which kind of reasoning to explicitly base a judgment upon is not necessarily indicative of the moral foundation of that judgment. To conclude on the basis of the differences in explicit reasoning in the courts that the difference between *Hindley* and *Re Thompson and Another* is that the former is a case of retributivist principle and the latter is not, misunderstands the process of ‘principled’ reasoning. In making decisions as to whom we regard as a responsible individual at the time that a crime was committed, we must incorporate external, non-moral factors. Where the responsibility of a criminal for his or her crime is in issue, there must be some prospective motivation for a judge to take seriously a claim that she was not.

#### 4. Conclusion

The liberal approaches to theorising a universally inclusive system of justice aims to derive justification for its principles on the basis of mutual regard, respect and understanding. Since these basic premises involve notions of personhood, liberal universality does find a limit in situations in which personhood is called into question. Thus in *Re A* we see how, in the interpretation of the right to life in cases involving a choice of lives, judges must decide who makes the greater appeal to justice. This interpretation requires the support of considerations of non-principled utility: reasoning traditionally regarded as antithetical to the deontological perspective. Mary's death is justified by a combination of the identification of her as a threat, and the practical difference between her and Jodie in terms of life chances. Rawls assumes that we agree that being reasonable entails a shared specific understanding of the essential notions of freedom and equality; that an overlapping consensus on a conception of justice can be established through interaction on this level of reasonableness. But these assumptions do not and cannot ensure that everyone affected by notions of justice can participate in their construction. Whether this is a weakness that derives from the failure of liberalism to realise its own goals of universalism, or whether language is itself inadequate in providing the tools for conceiving a truly universal justice is a very deep and complex one that I will not attempt to answer here. Perhaps what our discussion is leading towards is the unearthing of a different way of talking about law and justice, and about the perceived gap between the universality of justice and the limitedness of law. The analysis so far suggests that liberal principle is engaged in a



constant negotiation and compromise with unprincipled consequentialism.<sup>93</sup> If it were necessary to think of liberal principle as being *pure* then one would be forced to conclude, falsely, that a judgment based on this mix of right to life and quality of life simply departs from principled parameters. My argument is not that judges are avoiding the principles, but that their mobilisation in law relies on reasoning traditionally regarded as antithetical to deontology. Criteria such as a subject's future prospects in interpreting the right to life or the retributive requirements of a prison tariff or minimum term are not criteria proper to liberal principle, and yet these are congealed together in judicial rhetoric. But now the question is this: once we move from liberal principles to calculations of benefit, are we still talking about justice at all? If we continue to dogmatically define justice in the liberal purely deontological sense then the answer must be in the negative. However, our analysis suggests that a decision as to a matter of principle is a negotiation between the deontological rights and contingent, consequentialist factors.

The effect of this negotiation is that it is possible for certain entities to be excluded from liberalism's universality. Interpreted as falling short of the liberal idea of the reasonable, rational and responsible individual, Mary and Thompson and Venables are entities that occupy this moral no-man's land outside of liberalism's reach. If an injustice has been done to Mary in *Re A*, it is not an injustice that, from a liberal perspective, can be meaningfully spoken of, since justice is defined in terms of membership (or in Mary's case, *non-membership*) of

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<sup>93</sup> See Cover, R. M. *Justice Accused: Antislavery and the Judicial Process* (New Haven, Conn. and London: Yale University Press, 1975) where the author argues that the progress of the gradual tendency towards judicial interpretation in U.S. state courts that state declarations of rights effectively abolish slavery depended upon local practises as much as a principled factors.

the universal moral community.<sup>94</sup> The post-metaphysical writings of Rawls and Habermas leave intact metaphysical ideas of the person, very much in alignment with the Kantian end in itself. Rather than leaving metaphysics behind, they have merely turned it to a more subtle use. Just as, for Kant, a morality that does not find its ultimate foundation in the categorical imperative is not morality at all, so for Rawls and Habermas, a conception of ‘justice’ is not justice at all if not founded on their respective a priori, non-negotiable first principles. There are alternative ways to articulate and manipulate metaphysical ideas, and it is to a reading of one such alternative – deconstruction – that I turn in the next chapter.

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<sup>94</sup> See Fox, M.A. ‘The Moral Community’ in LaFollette, H. *Ethics in Practice: An Anthology* (Oxford: Blackwell, 1999) pp.127 – 138, for whom moral status is defined by “mutual likeness” in terms of “certain salient characteristics” (p.128)



## Chapter 5

### Deconstruction and Legal Judgment

#### 1. Introduction

Having attempted in the previous chapter to demonstrate the limitations of liberal principle within legal judgment, this chapter now locates these limitations in a wider theory of language. The sections below first rehearse the theoretical strategies of deconstruction as discussed by Derrida and outline some of the key markers of its uneasy relationship with philosophy and critical theory, and then attempt to apply them in the context of our specific legal case-studies. This chapter argues that the difficulty of conceptually separating pure principle from unprincipled consequentialism is indicative of a more general undecidability in language. It is within this act of reconstructing matters of principle in difficult legal contexts that the limits of principle are exposed. The liberal principled approach strives to stand alone as a discourse of justification, but it fails to do so because of the fundamental impurity of its foundational concepts. Our interest in Derrida and deconstruction lies in the problem of access to the pure, foundational principles which are supposed to provide the ultimate justification for our judgments. A deconstruction of legal judgment characterises the possibility of knowing the ‘true’ and ‘original’ nature of liberal principles, such as that of the responsible individual as closed off, forcing judicial interpretation to rely upon rhetorical and metaphorical manoeuvres. Being inaccessible in themselves, such liberal ideas are as *myths* of origin, and

the liberal attempts to define it, a vain nostalgia for the loss of a presence that was never there in the first place. This is why, from a deconstructive perspective, the meaning of notions that depend upon the interpretation of this origin, such as the ‘right to life’, are elusive. Given the impossibility of knowing exactly how the pure deontology of liberalism’s foundational principles are to apply in the instance of judgment, legal interpretation always requires the assistance of unpredictable, contingent factors. This chapter is an attempt to show how the legal interpretation of liberal principles in legal judgment as a sub-species of western thought might represent, as Derrida describes it, the vain search for the origin for true representation of justice, and the nature of this eternal loss.<sup>1</sup>

## 2. Opening Remarks on Deconstruction

A liberal response to deconstruction would contend that it misses the mark because judgment in cases such as these does not pretend to arise purely out of considerations of principle; that to highlight the failure of principle to act in a self-sufficient manner is to criticise it for something that it never set out to achieve anyway. I am shooting at a target that is not there. It is no remarkable insight to suggest that there is more than the principles at work in the judgments. Philosophers are not unaware of the difficulties of meaning; to a

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<sup>1</sup> We will use the expression ‘western thought’ here, as does Derrida, though unlike Derrida without capital letters. Although this thesis does not seek to explain Derrida’s use of the expression in its capitalised form, we shall consider criticisms of what might amount to essentialising tendencies in Derrida’s work.



large extent the history of Anglo-American analytic philosophy is a history of attempts to overcome the problems of uncertainty of meaning. The canonical works of say, Frege,<sup>2</sup> Russell,<sup>3</sup> Wittgenstein,<sup>4</sup> Ayer<sup>5</sup> and Austin<sup>6</sup> all attempt the task that Derrida regards as impossible: how to distinguish that which is certain and reliable from that which is not, and specifically how can meaningful, reliable representation be possible? Similarly, the work of Rawls and Habermas can be seen as attempts to conceive the conditions for describing with certainty the conditions for meaningful discourse on justice.

The thrust of deconstruction is that meaning depends upon context, itself an ever-changing set of conditions, and so all words and phrases are cut off from a stable centre or guarantor of meaning. Since there is no logical end to the number of different types of context that words or concepts could appear in, there is no logical end to meaning itself. All meaning is hence 'textual' inasmuch as we are required to treat any exception as a literary text: interpreting it in the light of the context in which we find it. Interpretation will involve an infinite range of possible influences, all of which are themselves contextual.

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<sup>2</sup> Frege, G. *Logical Investigations*, Geach, P.T. (ed.), Geach, P.T. and Stoothoff, R.H. (trans.)

(New Haven, Conn.: Yale University Press, 1977)

<sup>3</sup> Russell, B. *An Enquiry into Meaning and Truth* (London: Penguin, 1962); see also Russell,

B. *Foundations of Logic* with assistance of Albert C. Lewis (London: Routledge, 1994)

<sup>4</sup> Wittgenstein, L. *Tractatus Logico-Philosophicus*, (London: Routledge, 2000)

<sup>5</sup> Ayer, A.J. *Language, Truth and Logic* (Harmondsworth: Penguin, 1990)

<sup>6</sup> Austin, J.L. *How to Do Things With Words* (Oxford: Oxford University Press, 1975)

Since, as there is always the possibility of interpreting that context differently, ‘true’ meaning is lost within context and interpretation.<sup>7</sup>

Derrida’s emphasis upon the impossibility of conquering context represents a rejection of the careful patience of analytic philosophers in identifying the conditions for certainty. From an analytical philosophical perspective, one might regard Derrida’s remarks on truth and context as a theory of despair. However, it would be wrong to imagine that Derrida regards any discourse on meaning and certainty as redundant. As is explored in more detail in the next chapter, there is no uncontroversial way of summarising Derrida or deconstruction. The broad range, style and purpose of writings by Derrida and others indicate that it is far from certain whether deconstruction offers an original critique of philosophy, a non-original philosophical critical method, a kind of pragmatism, moral relativism, negative dialectic, or nothing philosophical at all.<sup>8</sup> All I can do here is explore what I understand to be deconstruction’s insistence that meaning does not have a polar opposite in meaninglessness. In deconstruction, both success and failure of meaning are the effects of the ‘iterability’ of words: that they are repeatable in, and affected by, contexts that cannot be pre-determined. For the analytic philosopher, the inquiry as to the meaning of a phrase would involve an identification of the conditions in which its meaning could be determined with certainty. A deconstructive perspective, however, would seek to show how such conditions, although

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<sup>7</sup> See Critchley, S. *The Ethics of Deconstruction* (Oxford and Cambridge, Mass.: Blackwell, 1992) p.38-9

<sup>8</sup> The bitter dispute over Derrida’s legacy, particularly with reference to Rorty and Norris is discussed in chapter six, *infra*.



necessary, become overpowered by the infinity of context and consequently the possibilities for reinterpretation. Deconstruction involves a number of complex theoretical moves that attempt to illustrate how the search for certainty fails and true meanings become elusive. These are discussed below.

## 2.1 *The Conceptual Prioritisation of Speech over Writing*

An account of deconstruction might begin with Derrida's conception of western thought<sup>9</sup> (i.e. western philosophy, literature, art, history, politics, media etc) and its representation of the world. For Derrida, western thought is characterised by a nostalgia for lost origins, and thus for lost 'presence'. The idea is that, by its nature, an origin is that which is first, unsullied, primary. If one had access to an origin, it would contain no secrets because it will not have been subjected to the distorting effects of modern culture. Its meaning is present to us. The problem is that developments of modern culture have obscured all origins; the world around us is known only through cultural signification, which, in western thought, stands in for the world itself. This obfuscation has led to a situation of absence: True meaning as unknown or unknowable. Therefore the only remaining option for authors, artists, historians etc of the west is, in Arthurian style, to try to *regain* its lost origins and thus regain knowledge of true meanings by identifying that which is pure, unspoiled, certain, etc. To this purpose, the world is conceptually ordered by contrasting, on the one hand, notions that offer a chance of regaining of this lost presence against their

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<sup>9</sup> Or as Derrida has put it, "Western Thought", see Derrida, J. *Writing and Difference*, Bass, A. (trans.) (London: Routledge, 2002a) p.2

opposites, which represent absence, on the other. Derrida describes as ‘metaphysical’ any system of thought that is concerned in this fashion with presence.

“The history of metaphysics, like the history of the West, is the history of these metaphors and metonymies. Its matrix... is the determination of being as presence in all the senses of this word. It would be possible to show that all the names related to fundamentals, to principles, or to the center have always designated the constant of a presence.”<sup>10</sup>

Hence we contrast ‘self’ with ‘other’: we know (or think we know) our own thoughts, feelings and perceptions because they are immediately present to us. It is natural and rational to know oneself. On the other hand we are physically separated from others: since we think of others as having their own mental world, we do not have the same privileged knowledge. The thoughts and feelings of others are absent from us. The difference between presence-of-self and absence-of-other underpins a mode of thinking which divides the world into a set of conceptual binary oppositions which give rise to value judgments. In each binary opposition one term is always privileged over the other on the basis that in one we find present, identifiable meaning, which in the other is absent. According to Derrida, such binary logic has pervaded “Western Thought”<sup>11</sup>

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<sup>10</sup> *Ibid.*, p. 353

<sup>11</sup> *Ibid.*, p.2; The issue as to whether Derrida over-generalises the objects of his analyses is raised in chapter six, *infra*.



since its earliest beginnings. It has produced a discourse of ‘natural’ hierarchy which has given rise to an order of things that appears natural. The dominant discourses of philosophy and the arts have contributed to producing a certain representation of the world in which familiar characteristics are given priority over that which is unfamiliar. Given that ‘presence’ is attributed to that which is known and considered natural and absence to that which is not known and considered unnatural, the kinds of ‘them and us’ judgments become to seem pervasive.

By standards of philosophical theory, even Derrida’s supporters find his approach of conceiving western thought – especially in Derrida’s bold capitalisation of the expression – in terms of binary opposites as rather sweeping. Critics such as Eagleton<sup>12</sup> and Ellis<sup>13</sup> find Derrida’s strategy to be tantamount to crude strawman-building and an avoidance of real engagement with the subtleties of philosophy. Other commentators have been quick to point out the political implications of Derrida’s view of thought. For these commentators, Derrida “decolonises” and “decentralises”<sup>14</sup> imperialist tendencies in western thinking.<sup>15</sup> Fitzpatrick, whose work is returned to later,

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<sup>12</sup> Eagleton, T. *The Illusions of Postmodernism* (Oxford: Blackwell, 1996)

<sup>13</sup> Ellis, J. *Against Deconstruction*, Princeton N.J. & Guildford: Princeton University Press, 1989)

<sup>14</sup> Young, R. *White Mythologies: Writing History and the West* (London and New York, N.Y.: Routledge, 1990) p.18

<sup>15</sup> For instance, Douzinas regards it as “strangely immoral” that western thought operates through a systematic of assimilation to and exclusion from its own values (See Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000) p.347). H  len Cixous reads deconstruction as a testament to the way in

argues that modern law seeks to distance itself and its values from civilisations founded on ‘myth’, whose characteristics of savagery, brutality, lawlessness, chaos and backwardness it holds out as ‘other’ to its own values of reason, civility and progress.<sup>16</sup>

For Derrida the organisation of the represented world into binary oppositions, underpinned by the notion of presence in and of ‘self’, finds expression in the prioritisation of speech over writing. Representation is hierarchised according to the reliability of the medium in terms of its physical proximity to the original thought. Speech, as issuing from a person’s mouth, is situated so close to original thought that it may be considered to be authentic. We will always know what meaning to attach to a speaker’s words because the speaker is present to clarify. The meaning of spoken words is present to us

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which inequalities between man and woman are represented as natural: man traditionally represented as rational, cerebral, active, strong, etc – woman as emotional, passive and weak (See Cixous, H. and Clement, C. *The Newly Born Woman*, Wing, B. (trans.) (Manchester: Manchester University Press, 1986) p.63). Similarly, Martin McQuillan points to the way in which West and East have “always” been represented in Western literature, film and media reporting: ‘West’ [as] “rational, progressive, recognisable, scientific, masculine and moral; ‘East’ [as] irrational, backward, exotic, mystical, feminine [and] amoral.” McQuillan suggests that the very use of the term ‘Middle-East’ in news reports illustrates the problem, “since those who live there do not think of themselves as east of anywhere, let alone in the ‘middle’ of something” (See McQuillan, M. *Deconstruction: A Reader* (Edinburgh: Edinburgh University Press, 2000) pp.9-10).

<sup>16</sup> Fitzpatrick, P. *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) pp.164-70, p.125, p.192. See also Paliwala, A. ‘Irresolutions of Modernity, Law, Nation and Empire: A Reading of Fitzpatrick’s *Modernism and the Grounds of Law* in conjunction with Hardt and Negri’s *Empire*’ *LGD* 2003 (1)



because the gap between the speaker's original thoughts and words is so slight. Writing, on the other hand, signifies absence. Its formal and physical disconnection from the original thought means that the written text is vulnerable to being copied, interpreted, put into a different context and hence misread and misused. Hence the true meaning of the written text is 'absent' since it is open to dissemination, distortion, doubt, etc as it falls into the hands of different readers.<sup>17</sup> The difference between speech and writing represents the difference between the familiar and the unfamiliar. This is the binary hierarchy that Derrida regards as general to western thought. Thus, writing is relegated to the role of representing or standing in for speech, when the speaker is no longer present or out of earshot. Being vulnerable to the vices of misrepresentation and use in different context, writing is considered a poor stand-in for speech, but necessary in modern culture in which the distribution of information beyond local earshot is vital. Derrida identifies this privileging repeated throughout philosophical texts which attempt to guarantee the certainty or authenticity of the way they represent the world.<sup>18</sup> To illustrate the binary opposition between presence and absence in western thought, it is perhaps helpful to examine examples of the express prioritisation of speech over writing before considering more disputable cases that Derrida finds within modern analytic philosophy. Plato and Rousseau provide such an example.

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<sup>17</sup> Wolfreys, J. *Deconstruction: Derrida* (Basingstoke: MacMillan Press, 1998) p.68

<sup>18</sup> The special status of authenticity accorded to speech is identifiable in the legal process. For instance, a trial witness's testimony is regarded as more likely to be authentic if it is spoken in court, following a spoken oath.

In *Phaedrus*, Plato recounts a story in which the Egyptian god Theuth presents his remedy for the fallibility of human memory to King Thamus. The remedy is writing – ideas and commands that are written down will outlive and hence remedy the fallibility of memory. The King however is not impressed and gives a damning judgment on the dangers of writing for the people of Egypt:

“...it will implant forgetfulness in their souls... calling things to remembrance no longer from within themselves but by means of external marks... it is no true wisdom but only its semblance...”<sup>19</sup>

Writing might *appear* to be an aid to memory, but in fact it merely masquerades as such, fostering forgetfulness and restoring not true thoughts themselves but only representations of them. Its potential for harming vivacious, living speech means that it is a dangerous thing which should be suppressed. Plato wants to emphasise the secondary and derivative nature of writing: a thing with no essence of its own:

“When it is written down, the composition, whatever it may be, drifts all over the place;...it doesn’t know how to address the right people, and not to address the wrong.”<sup>20</sup>

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<sup>19</sup> Plato, *Phaedrus*, Hackworth, R. (trans.) (Cambridge: Cambridge University Press, 1990)

p.157

<sup>20</sup> *Ibid.*, p.158



Plato's concern here is that once words are written down control over them is lost and so there is no way of preventing originally good words from falling into the wrong hands and being used for bad purposes. Writing is a "graceless resource". There "no insurance" against the dangers that it poses in its tendency of infinite and unpredictable dissemination.<sup>21</sup>

In a similarly pejorative manner, Rousseau describes writing as the "dangerous supplement", referring to the danger he perceives in allowing the subtleties and hindsight available to himself as a writer to distort his account of himself in the *Confessions*. Derrida points to passages in other texts, where Rousseau contrasts apparently 'natural' things with their 'cultured' or contrived modern development. Simple vocal melody is prioritised over instrumental music and painting because of the human presence in the voice:

"Painting is often dead and inanimate. It can carry you to the depth of the desert; but as soon as vocal signs strike your ear, they announce to you a being like yourself. They are, so to speak, the organs of the soul."<sup>22</sup>

In imitating passionate voice, vocal song simultaneously represents proximity to full presence of the Self and also mark humanity as distinct from nature – since animals cannot imitate in this way. But Rousseau complains that the naturalness of melody is usurped by the complications of harmony. Rousseau recalls the

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<sup>21</sup> Derrida (2002a) *supra*, n.9, p.11

<sup>22</sup> Rousseau, quoted in Derrida, J. *Of Grammatology* Spivak, G.C. (trans.) (Baltimore: John Hopkins University Press, 1998) p.196

degeneration of language and music as a loss of energy caused by perfecting, generating new rules and complications. Melody began to be supplemented and usurped by harmony until singing had become cut off from its proper origin in passionate speech.<sup>23</sup> The danger posed to speech by writing contains the seeds of its deconstruction.<sup>24</sup>

Derrida identifies the hierarchy of speech over writing in the texts of western thought generally. This tendency reveals itself through authors' comments on the problems of meaning and certainty. As an illustration, this section shall rehearse Derrida's deconstructions of Austin's speech-act theory and also Marx's theory of commodification. Austin draws a distinction between 'performative' speech-acts and 'constative' ones. Constative are regarded as better suited to philosophical propositions, as they pertain only to establishing truth or falsity. However, performatives – which perform an action such as getting married or making a promise – can also have definite meaning by qualifying as 'happy' performatives. In defining the conditions for happy performatives, Austin divides serious from non-serious speech, which Derrida claims represent, respectively 'speech' and 'writing' in order to ground a theory of meaning. For Austin, one can only successfully perform an action through the speaking of words (e.g. get married) if certain conditions are present. These conditions are that the words are spoken 'seriously', i.e. if there is an existing conventional code which is followed correctly and completely, by someone in a position make the statement in question, with sincerity in the right

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<sup>23</sup> Derrida, *Ibid.*, p.199

<sup>24</sup> Derrida, J. *Dissemination* (London: Athlone, 1993) p.102-3



circumstances.<sup>25</sup> If the words are spoken ‘unseriously’, i.e. if there is any failure in the above conditions or the words are “said by an actor on the stage, or if introduced in a poem or spoken in soliloquy”<sup>26</sup> then we cannot be sure of their meaning and the action cannot be said to have been performed. Austin states that words spoken in this fashion (stage, poem or soliloquy) are to be excluded from consideration because they are “parasitic upon... normal use.”<sup>27</sup> For Austin, such exclusions and distinctions are necessary for delimiting the context in which the sentence is used. From this perspective it is simply a matter of practicality that words spoken in contexts which might have unusual or unpredictable effects upon the meaning of those words, are excluded from a general theory of meaning. However for Derrida such an opposition between the serious and non-serious is symptomatic of the characteristics found in the opposition between speech and writing in the sense that in ‘serious’ speech-acts, meaning is present within the words. In such a case we are led to think that we know the speakers intention, since their words are located within a determinate context. In ‘non-serious’ speech-acts meaning is absent: context is indeterminate or misunderstood, so the intention of the speaker and hence meaning of their words cannot be guaranteed. Austin’s examples of non-serious, and hence excluded speech are examples of “citation” – the secondary representation of previously conceived thoughts.<sup>28</sup> The problems that Derrida locates in Austin’s

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<sup>25</sup> Austin, J.L. (1975) *supra*, n.6, pp.14-16

<sup>26</sup> *Ibid.*, p. 22

<sup>27</sup> *Ibid.*

<sup>28</sup> Derrida, J. ‘Signature, Event, Context’ *Glyph: John Hopkins Textual Studies* (1977) vol.1 pp. 172-197, p. 190

attempts to delimit the context of performative language use shall be returned to at a later stage.

Derrida points to the writings of Karl Marx as another example of the speech/writing hierarchy. At the beginning of his analysis of capitalist society, Marx sets out to define the ‘commodity’ (the individual external object), and in particular the distinction between a commodity’s use-value and exchange value. For Marx, objects have a natural, pre-capitalist value in terms of their practical use in the world, and this is determined purely by its physical qualities.<sup>29</sup> However, once exposed to the world of abstract monetary exchange simple objects become valued according to an abstract third thing. Value is no longer identical with the physical object itself; in fact once all objects are reduced to an objective measure, “all sensuous characteristics are extinguished.”<sup>30</sup> Marx argues that the exchange value of a commodified object gives rise to a movement that is beyond its physical nature, thus turning it into a kind of spectre. At once, an ordinary table “transcends sensuousness... and evolves out of its wooden brain grotesque ideas, far more wonderful than if it were to begin dancing of its own free will.”<sup>31</sup> Of course, they are not moving by themselves: the transformation from simple innocent object to commodity for exchange is achieved by ‘labour-time’ in production.<sup>32</sup> However, the role of labour is obscured by its own commodification, since the particular qualities of the type

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<sup>29</sup> Marx, K. *Capital: A Critique of Political Economy Vol. 1*, Ben Fowkes (trans.) (London: Penguin Classics, 1990) p.126

<sup>30</sup> *Ibid.*, p.128

<sup>31</sup> *Ibid.*, p.163-4

<sup>32</sup> *Ibid.*, p.130



of labour employed are likewise extinguished.<sup>33</sup> What interests Derrida is Marx's implication that there is a realm of natural self-identity of objects and labour which is changed in a negative sense – devalued and denaturalised – by the moment in which it enters the realm of exchange.<sup>34</sup> Like the meaning of a person's 'serious speech' in a pre-determined context in Austin's theory, the value of an object prior to its commodification can be easily and naturally determined. Its spectral life in the realm of capitalist exchange renders 'value' a mysterious, indeterminate thing, as writing exposes the meaning of a sentence to indeterminacy. A formerly "obvious, trivial thing" turns out to "abound in metaphysical subtleties and theological niceties"<sup>35</sup> and heralds a movement between things that threatens, not just to evade our control, but actually to control us. In short, commodification carries the dangers that deconstruction identifies in writing.

For liberals, deontological moral principle can be distinguished from consequentialism on the basis that where-as the former can always be known in advance, the latter is always given to doubt and uncertainty since its meaning or outcome is only determinable by the context in which it finds itself. The meaning of a deontological principle is perceived as being present even before we know its context, which is not the case for a consequentialist consideration. Hence deontological principle accords to speech, and consequentialism accords to writing. Fitzpatrick identifies the modern denigration of myth in favour of the

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<sup>33</sup> *Ibid.*, p.128

<sup>34</sup> Derrida, J. *Spectres of Marx: The State of the Debt, the Work of Mourning and the New International*, Kamuf, P. (trans.) (London: Routledge, 1994) p.160

<sup>35</sup> Marx (1990) *supra*, n.29, p.163

determinate origin of law as central in justifying the European colonisation of foreign lands. In Hobbes's account of the original covenant, positive law is guaranteed a "mythic persistence" by virtue of the unconditional authority of the legislator.<sup>36</sup> As Austin contends, law must have a *determinate* source if it is to be authoritative. Uncivilised peoples are characterised by such jurisprudence as those for whom no such determinate source is evident. European settlers of America in Seventeenth Century found those already living there to lack fixity in terms of law, property relations or commercial practises – a fact that justified the assumption of sovereignty of them in eliminating savagery.<sup>37</sup> In identifying this understanding of law's dominance over that chaos which it extends its civilising jurisdiction, Fitzpatrick's analysis of Hobbes and Austin is recognisably 'deconstructive' because it locates the foundation of law as the very thing that it seeks to distance itself from. He writes: "Austin's consolidation of the idea of sovereignty replicates within modernity the mythic symbolism of the ordering centre of creation."<sup>38</sup> From this centre are derived the definable property laws and rights necessary for an ordered, civilised state. Outside of this is the indeterminacy of disorder and savagery from which no security or peace is possible.

Like most aspects of Derrida's analysis, the association of western thought with the binary opposition of speech and writing remains controversial and calls for a certain degree of imagination which many critics, especially

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<sup>36</sup> Fitzpatrick, P. *The Mythology of Modern Law* (London and New York, N.Y.: Routledge, 1992) p.73

<sup>37</sup> *Ibid.*, p.82

<sup>38</sup> *Ibid.*, p.86



philosophers, have taken as a basic lack of academic rigour on Derrida's part.<sup>39</sup> Of course one needs a certain guarantee of certainty that the words one hears are true if one is to rely upon them to make decisions. It should not be surprising that, characterised as a search for such guarantees in order to make reliable and meaningful remarks about ethics, aesthetics, mathematics etc western texts might show a tendency towards such a division.

## 2.2 *The Ubiquity of Writing*

The picture of western thinkers striving to secure their theories of meaning by prioritising the presence of speech over the absence of writing is one drawn by Derrida in order to show how it has consistently failed to. As Derrida points out, the speech/writing metaphor immediately fails to be identical with full presence. Speech is only proximate to original thought – from the beginning there is a gap separating the origin (presence) from speech. Hence rather than being a metaphor showing the achievement of full presence, it shows only nostalgia for presence that has always already evaded capture, even by the nearest human expression to it. Derrida's inversion of the priority of writing represents, for Gasché and Norris the transcendental philosophical core of Derrida's critique of western philosophy in that it rigorously demonstrates the "conditions of the possibility and impossibility of presence".<sup>40</sup> For others it represents the

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<sup>39</sup> This is a view that others, notably Gasché and Norris, have tried to resist. See chapter six, s. 4.1, *infra*.

<sup>40</sup> Gasché, R. *The Tain of The Mirror: Derrida and the Philosophy of Reflection* (Cambridge, Mass. and London: Harvard University Press, 1986) p. 177

hopeless, despairing loss of all possibility that we might ever know the Truth about the world. To witness Derrida's technique for disrupting the hierarchy between speech and writing one must look again at his analysis of Plato, Rousseau and Austin. In each case it is because the philosopher is unable to guarantee speech with full presence and requires the active support of its binary other (writing) that the traditional western dichotomy of presence/absence is disrupted.

If, as Plato wants to argue (and Derrida reads Austin and Marx to imply), writing were merely and purely external to speech – derivative of it and superficial – then it would have no other effect. King Thamus, who rejected Theuth's remedy for human forgetfulness in Plato's *Phaedrus* should have no fear about its effects upon the living spontaneity of speech. However, Derrida reads the anxieties expressed by western philosophers about its dangerous powers of usurpation and subterfuge as a concession that speech is not equivalent to full presence and that writing is not equivalent to full absence. Derrida finds that Plato allows his prioritisation of speech over writing to become undone through metaphor. Having established the subordination of speech to writing, Plato makes a statement that Derrida interprets as an admission that the moral hierarchy of speech over writing cannot be sustained. Plato refers to a type of speech that is “*written* in the soul of the learner”: a discourse of “unquestioned legitimacy”, which “goes together with knowledge”, “can defend itself, and knows to whom it should speak”.<sup>41</sup> It is because Plato can express the notion of good speech only through the metaphor of the bad (a kind of writing) that convinces Derrida that, in the end, Plato's story does not

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<sup>41</sup> Plato (1990) *supra*, n.19, p.159



present us with language as speech in its interior and writing derivative of and external to it, but simply *two kinds of writing*.<sup>42</sup> Writing assumes a role or status that is beyond Plato's control and Derrida finds this lack of control as a general mark of western thought also. The notion of the author losing control over the meaning of his subject is crucial to deconstruction and manifests itself in the notions of 'supplement', 'trace', 'undecidable' and 'différance'. The 'ubiquity' of writing is perhaps most simply understood as the impossibility of sustaining the moral or theoretical priority and distinction of one concept over another.

### 2.2.1 *The Undecidable*

It is important to Derrida that the unravelling of binary opposites comes from within the very heart of their logic. Derrida argues that the language used in subordinating writing to speech is inscribed from the start with ambiguity. When Plato's Theuth presents writing to the King it is described in the Greek as a "Pharmakon", translatable both as a 'remedy' and also as a harmful 'drug'. The correct meaning can only be gleaned from the context in which the word is used: before we understand its context it occupies an ambiguous position.<sup>43</sup> Derrida thus uses Plato's own argument against the grain of the text's explicit meaning: where Plato intends his argument that writing lacks its own essence (and hence its own value, being derivative of speech), Derrida interprets as further evidence of its undecidable nature.<sup>44</sup> Writing unnaturally extends the

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<sup>42</sup> Derrida (1993) *supra*, n.24. p.149

<sup>43</sup> *Ibid.*, p.98-100

<sup>44</sup> *Ibid.*, p.139

existence of thoughts, but being cut off from their original source these thoughts become lifeless and unable to respond to interrogation.<sup>45</sup> For Derrida, this does not mean that writing is absolutely lifeless and inanimate, but rather is zombie-like: neither living nor dead its status is undecidable.<sup>46</sup> Undecidability inscribes itself into the logic of every binary hierarchy of western thought. Returning to Marx's theory of commodification, Derrida argues that the distinction between use-value and exchange value cannot be sustained: spectrality and unreality cannot be confined to the realm of capitalist exchange because Marx contradicts himself as to when the simple, natural objects become commodities. Marx's explicit argument is, as noted above, that use-value precedes exchange value, the latter accruing through the application of labour in capitalist society. However, Marx also admits that as soon as one considers the value of an object, this value is already understood against a context of equivalences – the measure of exchange-value.<sup>47</sup> Hence, it appears that the commodity emerges both after and before the natural object itself: its status is undecidable and as in the case of writing as *Pharmakon*, so is the distinction between the natural and unnatural.

The significance of the commodity and its undecidability for legal theory requires a far more detailed discussion than is possible here; however it lies in

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<sup>45</sup> Plato (1990) *supra*, n.19, p.158

<sup>46</sup> Derrida (1993) *supra*, 24, p.143-4

<sup>47</sup> Marx (1990) *supra*, n.29, p.179: "...their [the commodities'] exchange puts them in relation with each other as values and realizes them as values. Hence commodities must be realized as values before they can be realized as use-values."



the operation of exchange in law's efforts to be just. For Balbus,<sup>48</sup> the “commodity form” of exchange is “equivalent” to the “legal form” of abstract rights and subjectivity which replaces “the multiplicity of concrete needs”.<sup>49</sup> In both cases, the singular, specific instance is replaced by the general measure against which all cases can be judged. Just as the exploitation of the worker is maintained by the commodification of both his own labour and that which he produces, an injustice is inflicted by law upon the singular instance that does not fit into this representational scheme whose moral landscape consists only of equivalent, abstract, individual bearers of rights.<sup>50</sup> For commentators such as Rose, Marx's distinction between singular use-value and exchange suggests the possibility of a notion of justice that is prior to the entry into the world of equivalences.<sup>51</sup> As discussed in Chapter Seven, Derrida's own approach to ethics is that which is oriented towards the singular Other. However, the undecidability of the use-value/exchange-value distinction means that a legal judgment can never guarantee ‘justice’ in the immediate, concrete sense that

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<sup>48</sup> See Balbus, I. *Marxism and Domination: A Neo-Hegelian, Feminist, Psychoanalytic Theory of Sexual, Political and Technological Liberation* (Princeton, N.J.: Princeton University Press, 1982) p. 101

<sup>49</sup> *Ibid.*

<sup>50</sup> See also Peter Gabel, who provides an existentialist account of the alienating effects of legal rights: Gabel, P. ‘The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves’ *Tex L Rev* (1984) 1563-1599 esp. pp. 1572-8.

<sup>51</sup> See Rose, G. *Mourning Becomes the Law: Philosophy and Representation* (Cambridge: Cambridge University Press, 1996). See also Kellogg, C. ‘Mourning Terminable and Interminable: Deconstruction, Law, Representation’ (Paper prepared for the Study of Law, Culture and the Humanities, Benjamin N. Cardozo School of Law and New York University, New York N.Y. March 7-9 2003).

Rose describes.<sup>52</sup> When we think of undecidability in the context of the possibility of justice in this way we can appreciate that ethical and political questions are discernible just beneath the surface of every discussion of undecidability. The next chapter will consider the implications of undecidability in terms of the practical consequences (that which is called ‘political’ in this thesis) that deconstruction engenders.

### 2.2.2 *Supplement and the Myth of Presence*

The failure of speech to guarantee full presence of meaning provides the basis for another of Derrida’s techniques. ‘Supplement’ signifies that which is added to and becomes part of something which should already be complete (e.g. vitamin supplements added to a supposedly already healthy diet).<sup>53</sup> Plato wants speech to be prior because he believes that it expresses true, living thought which writing does not. However, since lives and hence living memory are ultimately finite it cannot resist the invasion of writing; in fact it *needs* to be supplemented by writing because of its own shortcomings.<sup>54</sup> It is not presence (since presence is signified by presence of a self) but since it is required to supplement that which is assigned the position of presence then it is not absence either. It escapes the simple dichotomy of presence and absence. The notion of writing (or, more generally, the subordinate part of any binary hierarchy) as a

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<sup>52</sup> Derrida, J. ‘The Force of Law’ from Cornell, D. *Deconstruction and the Possibility of Justice* (New York, N.Y. & London: Routledge, 1992) chapter one.

<sup>53</sup> Collins, J. & Mayblin, B. *Introducing Derrida* (Cambridge: Icon, 2000) pp.34-5

<sup>54</sup> Derrida (1993) *supra*, n.24, p.109



supplement to speech is developed in Derrida's engagement with Rousseau.<sup>55</sup> The paradox for western thought that Derrida identifies here is that, even although writing is acknowledged as a necessary supplement to speech, this is nevertheless regarded as an addition of nothing, since writing is considered to be *exterior* to the full presence of meaning. This is a contradiction that leads Derrida to make another generalisation about language: that there is always a difference between full presence and linguistic signs deployed to represent it.<sup>56</sup> Accepting the fact of this difference entails accepting that since supplementation is always necessary, full presence of meaning is never achieved and is in fact a *myth*. For Derrida this signals that language itself is characterised by the inadequacy found by King Thamus in writing: that it has no essence of its own, that it "drifts all over the place". Whether spoken or written, language is doomed to be a kind of writing – never achieving full presence of meaning, always requiring supplementation. This leads us to the notions of iterability and also *différance*, discussed below.

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<sup>55</sup> In all of the cases in which Rousseau finds that originally natural and innocent practises are usurped by modern cultural ones, Rousseau eventually admits that the former are necessarily supplemented by the latter. For instance in the *Essay*, although vocal melody is prior to harmony in terms of proximity to original voice, the fact that its origin is as imitation of passionate voice, means that the degeneration of separation of song from voice has "always already begun" (Derrida (1998) *supra*, n.22, p.199). The presence of prioritised melody, then, is from the start infected with the imitative characteristic of its subordinate harmony. The biographical details of Rousseau's *Confessions* – for instance the loss of his mother and subsequent comfort found in his wife – Derrida reconfigures as an infinite chain of supplements. Everything significant to Rousseau is a supplement to make up for the lack of presence of something else in his life (*ibid*, p.159).

<sup>56</sup> *Ibid.*, p.167

### 2.2.3 Iterability, Context and Metaphor

We have established Derrida's view that writing occupies a role in western thought that is of greater significance than is accorded by the philosophers that he deconstructs. But the role that Derrida has in mind for writing (or at least its characteristics) is more than a mysterious ambiguity or a more-than-absent supplement. For Derrida it is writing's characteristic quality of "iterability" – "repetition-with-a difference"<sup>57</sup> – that is the condition both of possibility *and* impossibility of linguistic meaning. Intersubjective communication is made possible because words are repeatable in different contexts, but since changes of context alter meaning, this also makes final meaning impossible. This is the written character of all language, whether written or spoken.

In Derrida's reading of Austin, there is a stark contrast between analytic philosophy and deconstruction regarding attitudes towards the implications of uncertainty and the possibility of certainty. It has been noted above that Austin's theory of meaning depends upon the possibility of fixing the context of performative language use as a set of determinate variables. However, Derrida points to a passage in Austin's text which seems to rule this possibility out.<sup>58</sup> Austin regards that, unlike the simple true/false assertions of constatives, performatives are slightly more complex in that they consist of three different parts. The first part is the action achieved by the words (locutionary); the second

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<sup>57</sup> Staten, H. *Wittgenstein and Derrida* (Lincoln, N.E.: University of Nebraska Press, 1985)

p.112

<sup>58</sup> Derrida, J. (1977) *supra*, n.28, pp. 172-197; Austin, J (1975) *supra*, n.6



includes anything not directly intended but nevertheless also present in the performance (illocutionary); the third part relates to the effects produced in the audience of the words (perlocutionary).<sup>59</sup> In discussing illocutionary acts, Austin makes an admission that, for Derrida, shows that Austin's entire argument that performatives can have definite meaning unravels. Austin remarks that failure to identify all unintended achievements of a performative is "always possible".<sup>60</sup> Clearly Austin does not consider that this weakness threatens his larger analysis, but Derrida remarks that if such a failure is *always* a possibility, then how can one ever be certain of having conquered the context of the words spoken at all? If the danger of the excluded non-serious 'citational' speech is always present then surely citationality is not the occasional accident of language, but a very governing law.<sup>61</sup> Serious and non-serious speech may have different rules in terms of their use and appropriateness, but neither one can rely on full presence of meaning and determinate context. They are both governed by the characteristic that Derrida regards as the *writtenness* of all language that he calls 'iterability'.<sup>62</sup> In the deconstruction of Austin, the prioritisation of 'speech' (serious speech-acts) over 'writing' (non-serious speech-acts) becomes subverted.

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<sup>59</sup> For example in making a promise, the locutionary part would be constituted by my words being regarded as binding; the illocutionary part would involve say, checking on whether I could in fact honour the promise; the perlocutionary part would be the perception in my promisee of me owing whatever I promised to provide.

<sup>60</sup> Austin (1975) *supra*, n.6, p. 106

<sup>61</sup> Derrida (1977) *supra*, n.28, p.190

<sup>62</sup> *Ibid.*, p.192

Searle and Habermas separately examine Derrida's comments on Austin and reach similar conclusions as to Derrida's misreading, his overgeneralising and his reduction and levelling of important concepts and distinctions within philosophy. Searle takes issue with two aspects of Derrida's interpretation of Austin.<sup>63</sup> Firstly, that Derrida is wrong to read Austin as distinguishing serious from non-serious speech-acts on the basis of the iterability of the latter.<sup>64</sup> Secondly, Searle argues that Derrida accords Austin's exclusion of 'parasitic' types of speech from the realm of the 'serious' an unwarranted significance.<sup>65</sup> Habermas' critique of the same text is somewhat more sympathetic to Derrida's contention that Austin is wrong to imagine that context can be determined by the rules of successful speech-acts, but insists that this need not lead to

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<sup>63</sup> Searle, J.R. 'Reiterating the Differences: A Reply to Derrida' *Glyph: John Hopkins Textual Studies* (1977) Vol.1 pp.198-208

<sup>64</sup> Searle argues that Austin does not believe that successful speech-acts depend upon their not being iterable, since iterability is present in all language (*ibid*, p.206). For a promise to be successfully made – whether in speech or writing – the same rules must be followed. So the speech/writing distinction fails since the actor's intention is not in any way undermined by its being repeatable. (*ibid*, pp.207-8).

<sup>65</sup> For Searle, Austin's exclusion of them is neither a strong metaphysical claim nor a moral statement. Rather it is merely the ordinary fact that a promise or whatever simply cannot be performed unless such examples of speech are removed from consideration. (*ibid*, 204). For Austin to use the word 'parasite' may have been unduly dramatic – Searle insists that it merely expresses logical dependency. Searle may be misinterpreting Derrida somewhat here, since the moral order that Derrida locates in the texts of western thought is always only implied by fact of conventional meanings of words used being wider than the instance intended by the particular writer. Staten points out that, in ordinary language, the word "parasitic" does carry a moral implication, which Austin is not at liberty to exclude (Staten (1985) *supra*, n.57, pp. 124-5).



relativism. Whereas for Derrida, the indeterminacy of context indicates the ubiquity of writing and therefore the impossibility of determinate meaning, for Habermas, it calls into operation his own thesis of communicative rationality. Meaning and significance might operate differently from one context to the next, but for Habermas this leads to idealising presuppositions being made as to how different types of speech-act are validated, on the basis of what is “normal” in a local community.<sup>66</sup> If local meanings are understood in communication then serious speech-acts can be distinguished from non-serious on the basis of the different validity claims involved.<sup>67</sup> Habermas is keen to resist what he regards as Derrida’s attempt to collapse the distinction between ‘ordinary’ (i.e. serious) and ‘poetic’ (non-serious) language, since only the former can transcend local contingencies and give rise to universal rationality.

Habermas accepts that, even in ordinary serious speech there is always an element of narrative. In recalling, say, a true event, facts are ordered in a way that may resemble a story and may contain ambiguous elements. However, if the main purpose of the speech is to take on the responsibilities involved in making a speech-act (say, promising or betting or loaning, all of which involve making certain commitments) then the consequences make it distinct from poetic language, where the fictive and poetic elements are primary.<sup>68</sup> The problem with Habermas’s argument is that if the difference relies on emphasis then it is a very narrow one indeed. To what extent must the narrative and poetic

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<sup>66</sup> Habermas, J. *The Philosophical Discourses of Modernity* (Cambridge: Polity Press, 1990a) p.197

<sup>67</sup> *Ibid.*, pp. 198-9

<sup>68</sup> *Ibid.*, p.203

elements of a text be apparent before we say that an account is primarily literary and thus non-serious? Like Thamus' Pharmakon in Plato, speech in which the narrative element is primary takes the truth out of its ordinary context and in philosophical terms, devalues it. What began as a 'true' story then becomes a mere representation of a lost original, obscured within the poetic and fictive language, the meaning of which tends to be ambiguous.<sup>69</sup> In order to be sure of what that truth really is, poetic language needs to be kept out, and Derrida's over-generalising poeticising of all language ignores this basic need to know the truth about the objective world.<sup>70</sup>

But whether or not Habermas – or any of the critics – is deconstructable is rather beside the point, since on this interpretation, all philosophy is

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, p.205, p.207. If truth can only be told in a narrative form then the distinctions in terms of validity claims can not resist the suggestion that truth-telling is a type of story-telling – i.e. a type of writing. Fish gives a reply to Habermas that restates the doctrine that judgment independent of context is impossible. Fish agrees that the desire to discover first truths and undistorted reason may be a noble, one but every effort to do so – such as Habermas' communicative action or Austin's serious speech-acts – are "impossible abstractions". Why impossible? Because "every name [this desire] receives is intelligible only within the conditions it would escape." (Fish, S. *Doing What Comes Naturally: Change Rhetoric and the Practice of Literary and Legal Studies* (Durham, N.C. & London: Duke University Press, 1989) p.454). So the conditions of possibility and impossibility of critique are reversed. Where Habermas and Austin respectively find the only possibility of rational critique and meaningful performative speech-acts in making distinctions between forms of language, Fish finds only impossibility. For Fish and Rorty, 'free' action, thought and critique always depend upon the background structures that we happen to inhabit. The emancipation and freedom that Habermas believes is made possible by communicative action is merely the "passing from one structure of constraint for another." (*ibid.*, p. 459)



deconstructable by emphasising its metaphorical and rhetorical elements. Searle is correct to assert that the rules and foundations of philosophy are not supposed to be completely unassailable, but simply workable to a tolerable extent. They do a certain job – that of facilitating critical practises and so they should not be undermined unless there is a good reason to do so. Habermas fears that if the distinction between philosophy and poetry is effaced in the manner that Derrida’s comments on Austin suggest, then philosophy loses its “productivity” in uncovering the different forces at work in modernity.<sup>71</sup> Philosophical rigour is not crucial in literature because the purpose of literature is different to that of philosophy: “world-creating”,<sup>72</sup> “innovation”<sup>73</sup> and stimulation of creative imagination. But philosophy’s role is more serious – conceptualising and understanding the truth about the “objective world”,<sup>74</sup> about giving an account

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<sup>71</sup> Habermas (1990a) *supra*, n.66, p.210; Habermas’ writings – his engagements, for instance, with Adorno and Foucault – have striven to emphasise that modernity is full of ambivalences and contradictions. Capitalism, technology, human rights, democracy – modernity has both positive and negative effects and these cannot be appreciated by levelling and melting together, as deconstruction does, the separate discourses of reason, manipulation, truth and rhetoric. Only in ‘serious’ speech, with its ideal conditions of sincerity and truthfulness, does each person have an equal chance to have their needs and demands heard and considered. ‘Non-serious’ speech, with its playful use of rhetoric and metaphor, carries no such guarantee since individuals are at the mercy of whatever interpretation of justice or fairness their local community currently favours. The political implications of deconstruction will be considered in more depth in the next chapter.

<sup>72</sup> *Ibid.*, p.205

<sup>73</sup> *Ibid.*, p.201

<sup>74</sup> *Ibid.*, p.205

of “the way things stand in reality”.<sup>75</sup> Given such separate roles, what is the significance of Derrida’s assertion that Plato’s philosophical account of good writing can *only* be expressed through a metaphor of the bad? Is he suggesting that philosophy is dependant upon, and therefore secondary to metaphor? If so then this would imply that all of philosophy’s carefully constructed theorisations on possible knowledge and ethics are no more compelling than any fiction, and would in fact exist only as a branch of fiction. However, as Derrida suggests in his *White Mythology*, to describe philosophy as *essentially* metaphorical commits the same type of error that deconstruction finds in western philosophy generally. It is this practise of ‘essentialising’ that deconstruction deems as unethical reading – claiming full knowledge of our object and denying that it has other facets.<sup>76</sup> Interpretations of Derrida’s

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<sup>75</sup> Norris, C. *Deconstruction and the ‘Unfinished Project of Modernity’* (London: Athlone Press, 2000) p.40; This point on the role of metaphor as foundational in philosophy is a crucial one, but it is also highly controversial in the interpretation of Derrida, as discussed below. It is important for philosophy that metaphor is subordinated to being delimited and deployed by philosophy rather than the source or foundation of philosophy itself. This is a necessary state of affairs since metaphor is essentially that which has no particular essence of its own. Unlike philosophy it has no definite or stable structure, and this is tolerable to philosophy so long as metaphor (and its relatives rhetoric etc) stays in its proper, subordinate place. Within its own separate sphere of literature it may operate as it pleases, and in philosophical spheres it may be (and is) used to provide interesting illustrations of arguments and concepts. However, it cannot play a more foundational role in philosophy because, being a literary device it does not respect the need for stability of knowledge, reason, critique, truth, etc.

<sup>76</sup> On this view, to characterise philosophy as metaphorical is simply to repeat the same structures of thought as philosophy. In reply, one might assert that deconstruction does not reserve any special position for itself as regarding its own arguments. As a species of western



comments on metaphor and philosophy are bitterly disputed amongst critics because of the apparent consequences for legal and political theory. The dispute is discussed in more depth in the next chapter.

#### 2.2.4 *Différance*

‘Différance’, a word invented by Derrida that has no direct translation into English, is Derrida’s way of expressing his view of linguistic meaning. Différance inherits and adapts semiotic theory, usually attributed to Ferdinand de Saussure. Saussure’s theory of linguistics is founded on the premise that, since there is no natural or logical connection between any thing in the world and the collection of letters that represents it in language (say between a real dog and the letters d-o-g in English or c-h-i-e-n in French etc)<sup>77</sup> then meaning of a word is known instead by virtue of its difference from all other words.<sup>78</sup> The general structure of language is therefore characterised not by connection between signifiers (words) and the things in the world that they signify, but rather the differences between signifiers (words) themselves. Deconstruction adopts this synchronic view of language and adds to it its own insight: that meaning-as-difference has no logical end-point. No matter how many differences we identify there will always be others because of infinity of

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thought, deconstruction does not attempt to deny that it is itself subject to the very same logical, logocentric tendencies as philosophy.

<sup>77</sup> Saussure, F. de *Course in General Linguistics* (London: Duckworth, 2000) p. 67/s. 100

<sup>78</sup> *Ibid.*, p. 118/s.166: “In the language itself there are only differences... and no positive terms.”

context. Hence *différance* signifies not only to differ in meaning, but also to defer it - indefinitely. Since no sign carries 'natural' meaning within it, but relies instead on differentiation from other signs, each sign is itself only a *trace* of meaning.<sup>79</sup> *Différance* therefore operates to undermine the myth of 'original' (i.e. true, pure and pre-cultural) meaning by emphasising the always already deferred final definition. An 'origin' is an effect produced when the lack of full presence within a prioritised sign – that is, its separation from original thought – is suppressed. *Différance* is the non-suppression of this separation and the recognition of the role of supplementation in eternally striving and yet not quite succeeding to achieve reunification with origin and presence. *Différance* thus signifies the failure of linguistic signification to account fully for the meaning of words. The result is the interminable irreducibility of the world to a determinate set of names or labels, and 'final' meaning is always something other than our attempts to name it.<sup>80</sup> This insight leads once more to the conclusion that language is characterised by writing, rather than speech.<sup>81</sup> It should be clear by

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<sup>79</sup> Critchley, S. (1992) *supra*, n.7, p.37

<sup>80</sup> *Ibid.*, p.41: This is the idea of 'otherness': an idea of some considerable importance for our discussion of deconstruction and ethics in chapter seven.

<sup>81</sup> e.g. see Derrida, 'The Violence of the Letter: From Levi Strauss to Rousseau' pp. 101-164 and '...That Dangerous Supplement...' pp. 141-164 in Derrida (1998) *supra*, n.18; As an account of meaning, Derrida's adoption of Saussure's approach to language is not without its problematic implications for philosophy and critique. In adopting Saussure's linguistic system, Derrida attracts criticism. One is that Saussure's binary (signifier/signified) system, with no account of the relationship between the two elements, sets language up only in order to display the failure of presence that Derrida is seeking to establish. Since for Derrida the only significant relationship is that between signifiers there is the criticism that deconstruction is concerned only with signifiers and not the real world of their referents. There is always an



now that deconstruction resists any ‘third’ element which purports to stabilise meaning – such as Austin’s “total context” – since all things are readable (and hence deconstructable) as texts. It appears that one is faced with the stark choice between the ‘total’, determinate context that Austin promises through his theory of serious speech on the one hand, and the ‘infinite’, indeterminate context that Derrida’s own view suggests.

### **3. The Rhetoric of Presence and its Unravelling in Legal Judgment**

In identifying the indeterminacy of liberal principle, rhetorically constructed within the indefinite context of consequentialist factors, the spadework of deconstruction has already been done in the previous chapter. That chapter presented principle and consequentialism as engaged in a symbiotic relationship, each depending upon the other for meaning and moral coherence. Although the judges did approach the cases as unique in many respects, their

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unexplained gap between signifier and signified (simply an ‘arbitrary’ relationship) ruling out any confident statement about the meaning of concepts such as justice or ethics. Any commentary based on Saussure’s dualist linguistics is itself blind to the essentially endless deferral implied by it (See Sheriff, J.K. *The Fate of Meaning: Charles Peirce, Structuralism and Literature* (Princeton N.J. & Guildford: Princeton University Press, 1989) p.47). This view of language will always allow deconstruction of whatever meaning is posited, without ever giving a satisfactory account how any meaning comes to be present at all. Différance accounts for failure of full presence through the failure of speech to hold back the “writtenness” or “iterability” of language, but not for the extent of communicative success experienced by users of language in their everyday lives. What is needed, argue some of his critics, is an element to supplement the binary system of signifier and signified, insufficient in itself to provide this account.

interpretation of the relevant principles were ostensibly an attempt to represent them in a way that is faithful to the liberal spirit of individual responsibility and rights. The judges' interpretations of ideas such as the individual as a morally responsible bearer of rights are thus readable as attempts to align contemporary legal problems with this original spirit or origin. If it were unproblematic to regard the judgments as in this way directly connected to pure *a priori* liberal principle, then it might be said that the individualist principles that feature in cases such as *Hindley* and *Thompson and Venables* are present to us in deciding on the right decision in the sense discussed above. If we can believe that the information we receive issues from its original source (or as close to its source as possible) rather than diluted and corrupted by interpretation in the light of indeterminate context, then we can feel more confident that we know its true nature. This is the case in legal language too. Someone who is persuaded that, say, the House of Lords gave the 'correct' decision in *Hindley* as a matter of principle, will believe that the meaning of the principle of retributivism can be known and applied in the instant case. Conversely, the critic who is persuaded to the contrary position is confident in their analysis because they believe the principle has been misunderstood and its proper meaning distorted. Either way the hierarchy of thought, in which an agent orients his or her judgment according to an original truth, remains the same. Judgment involves the representation and interpretation of a previously decided principle. The principle is the *a priori*; the steady bedrock which allows us to take our position. It is present to us inasmuch as we know what it means, and enables this crucial act of judgment. However, this view of the judges reaching back to an original principle as a moral guide is problematic, as seen in Chapter Four. The



symbiosis that we noted between principle and non-principle in deciding how a case ought to be interpreted indicates that such origins are obscured. There is too much ‘text’ between the task of contemporary judgment and the original spirit of liberal principle. Given the emphasis that Derrida places on the obscuring of the original, it almost seems to be a point of doctrine to assert that there never was any original liberal principle in the first place. By ‘original’ it should be remembered that this refers to a pure initial idea that exists prior to its dissemination and dilution in the world of uncertainty, contingency and accident. Alternatively one could suggest that there is no road between origin and contemporary judgment except that which is at all times infected with the latter – diluting the purity of principle and yet necessarily present in order to give those principles any practical meaning at all. If it is possible to talk in such terms at all, the judgments are ‘grounded’ in an undefined relationship between principle that is called *a priori* and the contingent conditions in which they are found.

Not only is there a symbiosis of fact and principle, principle is actually practically meaningless prior to an interpretation of fact. This prior interpretation depends, as seen in Chapter Four, upon a variety of different factors. As foundations for decision-making, the liberal individualist principles are conspicuous only by their absence. This is how the relationship of the deontological principles to the array of contingent empirical facts can be regarded as a relationship of speech to writing. The former is held to be prior to the latter in terms of presence, stability and certainty, but since the latter is necessary to supplement the inadequacy of the former in living up to this demand, this priority turns out to be reversible, or deconstructable. Recall also

the above discussion of Derrida's notion of 'différance'. Full meaning is infinitely deferred because the requirements of supplementation can never be exhausted. Each new instance in which a matter of principle has to be interpreted in the light of a difficult fact situation will require a different reading of those principles and a different reading of the facts. The possible contexts in which principle might find itself are infinite: this is why we would regard, as Derrida does in the case of speech and writing, that there never was any original conception of principle. Every principle has to be conceived in a context that is itself infinitely variable and open to reinterpretation. The attempt to nevertheless continue to think of the liberal principles as *deontological* or *a priori* is nostalgic: the continued hope, despite the vanity of it, for a return to a time when the truth was not obscured by politics. It is the nostalgia for an origin that is experienced as a loss, but was actually never present.

### *3.1 Undecidability and the Right to Life*

The Court of Appeal's judgment in *Re A* that Jodie represented a closer approximation to the liberal ideal of the rational and reasonable individual ensured moral priority of her life over her sister Mary's. This section shall examine the undecidability of this hierarchy in terms of its moral coherence and justification. The principled justification for *Re A* is that it purports to represent a legitimate use of violence. The life saved is a viable person; the one violated is not. This claim to a rightful use of violence is a crucial aspect of liberal principle – enshrined in the defence of Self Defence – and will form the focal point of our deconstruction. Thus, our focus here is the moral distinction



between liberal legitimate violence and the savage, illegitimate violence that threatens the order of law from the outside. Referring to Fitzpatrick, it is argued here that this distinction is undermined (deconstructed) by law's reliance upon mythic foundations which it holds out as the characteristics of savage, uncivilised communities.

As argued in Chapter Four, the case of *Re A* is a combination of universal and particular elements. The case arises from a set of almost unique facts, yet the decision is justified by the universal principle that the integrity of the individual bearer of rights must be protected. Therefore, despite rejecting pre-modern discourses of justification – religious, metaphysical, mythical, etc – modern law embraces a discourse that transcends the realms of the purely contingent and particular. In his exploration of the relationship between law and myth, Fitzpatrick argues that a bridge between law's transcendental universalism and its particularism can be found in the mythical account of the relationship between the law and the individual itself. Borrowing from Foucault, Fitzpatrick presents a theory of subjectivity that combines both state power and individual freedom. Through its ordinary administrative functions, the state produces an idea of what it is to be normal: to be free, or morally responsible. Individual autonomy is a response to the effect of institutional power: “The subject acts positively in the cause of its own normalisation or self realisation as normal”.<sup>82</sup> In this relationship the ‘individual’ and the law are mutually sustaining concepts. The state must assume that its citizens are morally autonomous individuals in order that it can justify holding offenders responsible for their actions. The law in turn provides the person with the model for his own

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<sup>82</sup> Fitzpatrick (1992) *supra*, n.36, p.122

freedom; we can aspire to become the sort of person whom the state respects as morally autonomous.<sup>83</sup> As in Hobbes's account of the original agreement, 'civilised' freedom under the law is the giving up of the natural situation of absolute freedom: a situation of war, anarchy and savagery).<sup>84</sup>

The convenient quality of the modern liberal notion of the 'individual' is that it allows modern law to provide its own account of how man-made laws can bind men, while at the same time denying the mythic grounds of this.<sup>85</sup> Being grounded only in the human individual's capacity for self-creation rather than theology, the story appears to be a 'rational' justification for the possibility of universality. Law is concerned with particular instances of conflict or violence and at the same time remains rooted in timeless, universal fixity.<sup>86</sup> As Paliwala explains: "This is the trick of the law. It is timeless and yet changes, every change being consolidated in a mythic timelessness."<sup>87</sup> The rational, reasonable individual links these aspects. However, as discussed above, when an either/or choice of lives must be made, the 'individual' as a collection of idealised liberal qualities is not unproblematically universal. In promising universality, non-rational elements are 'other' to it and unless they can efface their own otherness are excluded from moral consideration. Others "cannot speak or even seek the truth without first shedding their otherness."<sup>88</sup> Thus the principle of the 'individual' that distinguishes Jodie from Mary is the mythical legitimisation of

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<sup>83</sup> *Ibid.*, p.135

<sup>84</sup> *Ibid.*, p.126-7

<sup>85</sup> *Ibid.*, p.35-6

<sup>86</sup> Fitzpatrick (2001) *supra*, n.16, p.76

<sup>87</sup> Paliwala, (2003) *supra*, n.16

<sup>88</sup> Fitzpatrick (2001) *supra*, n.16, p.42



maintaining the otherness of the latter. In the rhetoric of mortal danger and disaster in the judicial speeches in *Re A*, we witness the construction of moral difference that emphasises the dangerous disorder that threatens law from outside, signalling an imperative to act quickly in self preservation.<sup>89</sup>

The failure of the myth of the individual to perform its bridging function without inflicting this violence returns us once again to the question of legitimate and illegitimate violence. The threat posed by Mary to Jodie – and in being unwarranted might be regarded as the “unlawful aggression” that forms an exception to the right to life in the ECHR – motivates the law to close ranks, to protect its claim to universality from being undermined. For, as Fitzpatrick notes, the violence of that which is other to the realm of liberal law’s universality is necessarily illegitimate. It is, to use Fitzpatrick’s words, “savage”.<sup>90</sup> Law’s use of violence is reluctantly inflicted, proportionate in its measure and subject to pre-determined rules. The violence of the savage is the outside threat – other to the law in its uncivilised nature – that must always be guarded against to maintain law’s integrity. Hence, characterised as an illegitimate threat of violence to her sister, Mary must be destroyed in the name of law as a *universal* civilising force. To use Fitzpatrick’s analogy, the lack of positive laws and rights amongst the Seventeenth Century Native Americans meant that no existing rights could be infringed by the imposition of a European legal framework. Similarly Mary’s lack of a determinate position vis-à-vis the individualist legal order ensures that she occupies no position at all that can be

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<sup>89</sup> Fitzpatrick (1992) *supra*, n.36, p.81

<sup>90</sup> *Ibid.* The savage is “in the eruptions and disruptions of untamed nature or barely contained human passion against which an ordering law is intrinsically set.”

legally ‘noticed’. Individualizing Mary – the “bodily integrity” that Robert Walker LJ regarded the ‘treatment’ as giving to her<sup>91</sup> – at the same time civilises Mary by giving her such a position. The fact that Mary cannot physically survive within this civilisation is irrelevant to the justifiability of giving it to her. After all, where no legal order existed previously, the expansion of liberal law’s universal borders infringes nothing,<sup>92</sup> irrespective of how much disorder and physical harm may be caused. Those that are ‘other’ to the new legal order must align or be eliminated.

Fitzpatrick thus invites us to consider the binary opposition between law and savagery, into which it is all too tempting to read the violent rhetoric by which Jodie is contrasted to Mary. The deconstruction of the moral order presented in *Re A* is made possible by the construction of this opposition between Jodie and Mary as representing values associated with law and savagery respectively. Let us recall: On what basis are we invited to accept this interpretation of the facts of the case? Chapter Four noted that it would not be sufficient to simply prefer one child’s ‘rights’ over the other: the consequentialist factors had to be imported in order to overcome the difficulty that Mary was, strictly speaking, a human being. On a principled perspective this is the wrong way around, since it appears that consequentialist factors are being deployed in order to make the competing interests fit into the moral hierarchy. Jodie and Mary take on the roles of, respectively, law and savage because of the supplementation of reasoning that carries all the characteristics of uncertainty and unruliness that law ascribes to its savage other. The desired

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<sup>91</sup> *Re A* [2000] 4 All ER 961, p.1069

<sup>92</sup> Fitzpatrick (1992) *supra*, n.36, p. 82



meaning of law in terms of determinateness, rights and order is thus necessarily separated from what one is forced to accept that it means: indeterminate and disorderly. In this way, the decision of *Re A* gives us another example of the writtenness of meaning: *différance* revealed in the uncovering of the separation between the purported true meaning of a principled foundation, and its representation in language. We are thus faced with moral uncertainty and are reminded of the always already yawning gap between perfect original presence and the closest representation of it, and hence that that which is prioritised is no less a *repetition* than that which is subordinated. The Right to Life is undecidable in purely principled terms.

### *3.3 Undecidability and the Responsible Individual in Punishment Judgments*

If, as Chapter Four contends, criminal responsibility is determined by the construction of a moral narrative composed of both retrospective and prospective considerations, then the foundation of rightful tariff judgment is not reasoned or rational, but poetic and rhetorical. Therefore, in the same way as the Right to Life in *Re A*, the criteria of judgment in this area is given to consequential uncertainty. Prospective considerations function as a supplement to retrospection, providing moral coherence for the eventual legal order in which Hindley stays in jail until her death and Thompson and Venables go free early. The problem, of course, is that, although the narrative is vital in providing moral coherence, since it is itself a rhetorical construct, this coherence is given to undecidability. This observation can be located within the language of deconstruction in the same way as *Re A*. Retrospectively determined criminal

responsibility cannot be adequately determined in absence of prospective factors. Thus, prospective factors are introduced but with caution. From a deconstructive perspective, what is interesting here is that, because the introduction of consequentialist factors is both necessary and threatening for the possibility of principled judgments, this is embedded within an overtly *moral* rhetoric. Thus the House of Lords' rejection of Hindley's contention that she should be given a finite tariff had to be contained within a *retrospective* argument that, in a retributivist sense, Hindley's crime deserved a particularly harsh punishment. Similarly the early release of Thompson and Venables on grounds of their reform and welfare is only introduced with the assertion that, as young children in 1993, they must escape the vicissitudes of retributivism. This introduction of retributivism's 'other' gives rise to precisely the kind of undecidability that Derrida identifies as the relationship between speech and writing. The 'other' is introduced as a mere supplement (e.g. writing as an aid to living memory, consequentialism as an aid to retributivism), implying that it occupies a subordinate position with respect to the primary concept. In the tariff judgments, the subordinate position of the consequentialism is maintained through reminders that it is only being *allowed* to enter the realm of principled judgment because retributivism as primary concept has already performed the initial task of identifying desert - and consequentialism would serve simply to bolster this assessment. Hence we learn that Hindley's crime was 'uniquely evil' and that Thompson and Venables' being children in 1993 was an 'overriding factor'. This is reminiscent of the master/servant hierarchy between principle and consequentialism (in which the latter serves to strengthen an already complete position) as between speech and writing. However, as seen in the



sections above, those who have attempted to wield 'writing' as a mere supplement have failed to confine it to this secondary role. As Austin fails to confine 'non-serious' speech-acts to a place that will not threaten his determinate context of serious (and hence meaningful) speech, the judges deployment of consequentialism within the rhetoric of retributivism cannot serve as an aid to judgment without also undermining the integrity of the principled foundation. As seen in Chapter Four, consequentialism can be regarded, less as a subordinate and a support to retributivism, and more as retributivism's primary determinative factor.

The reason why this failure comes about is the same as the Court of Appeal's failure to secure the certainty of the principled foundation of their decision in *Re A*. Since prospective consequences cannot be determined *a priori*, and because the apparently principled part of the judgment (the identification of the qualities of the rational individual) are dependent upon these contingencies, then no part of a judgment of principle can be called deontological. No part of the judgment can be given its own determinate context. Since it is itself constructed through consequentialist factors, this context is always open to doubt, uncertainty, reconstruction and reinvention. In other words, the context of principled judgment is infinite, reflecting the infinity of possible consequences, and hence the judgment is ultimately undecidable.

#### 4. Conclusion

Given that the principles of legal judgment are deconstructed through identifying their rhetorical and metaphorical determinations, we might wish to

view the principles of the individual, of the right to life and retributivism as just another ‘kind of writing’. Like everything else, it is determined only by metaphor and rhetoric, not by purely pre-determined *a priori* foundations, and hence has no meaning outside of deployment in rhetoric. If nothing else, the discussion of this chapter should show that, considered as a collection of rhetorical turns and metaphorical devices, the language of legal judgment can be viewed as finding its principled foundations, not by deontological principle itself, but through whatever rhetoric is at hand to make up for the deficiencies of meaning in principled reasoning. However, such a position is far from uncontroversial. The next chapter argues that, while certain inheritors of deconstruction - including Rorty and Fish - celebrate this rhetoricising of principled concepts, others flatly condemn it, insisting that deconstruction so deployed can only be debilitating for political and ethical critique.



## Chapter 6

### Interpretive and Critical Perspectives on Deconstruction and its Implications for Philosophical and Political Critique

#### 1. Introduction

In this chapter I hope to address some key areas of debate concerning the interpretation and criticism of the strategies of deconstruction concerning its implications for political and legal scholarship. Owing to its uneasy juxtaposition to philosophy and critical theory, deconstruction is subject to a vast range and depth of criticism, much of which is marked with a profound bewilderment and grievance. There is a feeling amongst certain critics that deconstruction's implications for meaning threaten the very possibility of radical thought and its proclaimed noble aims of emancipation, democracy and justice. This is fiercely contested, again on political grounds,<sup>1</sup> because it relates to what deconstruction can usefully offer to debates on law and ethics. Certainly it would appear that, given Derrida's identification of the search for solid theoretical foundations as a nostalgia for a lost origin that never existed in the first place, deconstruction leaves itself a precarious position from which to make any strong assertions of its own. Although not providing any definitive

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<sup>1</sup> See Chapter One, s.4, pp.50-1, *supra*, for a definition of 'political' critique. We are concerned here with deciding whether or not deconstruction facilitates or undermines such critique. A specific concern here is whether our definition of the political can be sustained in the context of deconstruction's problematising of the distinction between 'text' and the 'real'.

solutions, this chapter will attempt to demonstrate how the possible ethical and political significance of deconstruction depends upon whether one emphasises the philosophical or the more poetic aspects of Derrida's writings.

A summary examination of the critical literature on Derrida and deconstruction suggests that writers engaging in this debate broadly fall into three camps, each of which also incorporates much divergence and difference. First, there are those, including Habermas,<sup>2</sup> Eagleton<sup>3</sup> and Rose,<sup>4</sup> who associate deconstruction with Postmodernism and dismiss both for their tendency to lack careful analysis, to over-generalise and to conflate distinct discourses (most commonly cited examples being the conflation of 'science' and 'literature'; also of 'truth' and 'rhetoric'). These critics fear that deconstruction is an agent of nihilism and relativism, and that it debilitates serious critical thought. Secondly, there are the pragmatist theorists such as Fish<sup>5</sup> and Rorty,<sup>6</sup> who accept and celebrate the supposed collapse of distinctions which philosophers are keen to preserve. For these critics, judgement and interpretation is not a matter of isolating the conditions for a meaningful decision, but of relativistic and poetic playfulness. The third camp is that which distinguishes deconstruction and Postmodernism, prioritising the former over the latter in terms of persuasiveness

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<sup>2</sup> Habermas, J. *The Philosophical Discourses of Modernity*, (Cambridge: Polity Press, 1990a)

<sup>3</sup> Eagleton, T. *The Illusions of Postmodernism* (Oxford: Blackwell, 1996)

<sup>4</sup> Rose, G. *Mourning Becomes the Law: Philosophy and Representation* (Cambridge: Cambridge University Press, 1996)

<sup>5</sup> See Fish, S. *Doing What Comes Naturally: Change Rhetoric and the Practice of Literary and Legal Studies* (Durham, N.C. & London: Duke University Press, 1989)

<sup>6</sup> See Rorty, R. *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989)



and academic respectability. For these theorists, including Norris,<sup>7</sup> Gasché<sup>8</sup> and Bernstein,<sup>9</sup> the comments made by the first two camps about deconstruction and postmodernism are redirected to point only at the latter. Deconstruction is characterised, not as a nihilistic or relativising force, but as a serious philosophical perspective, upholding and maintaining many of the concepts of modern philosophy such as reason and truth. For these thinkers, deconstruction looks more like another philosophical approach, rather than the wholesale undermining of philosophy that the other groups regard it as. Critics that I identify as falling into one group or another are differentiated on a number of points that I do not want to ignore. The similarities drawn between them are very much a case of loose family resemblances rather than strong alliances.

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<sup>7</sup> See Norris, C. *What's Wrong With Postmodernism? Critical Theory and the Ends of Philosophy* (Baltimore: The John Hopkins University Press, 1990). See also Norris, C. *Deconstruction and the Unfinished Project of Modernity* (London: Athlone Press, 2000)

<sup>8</sup> Gasché, R. *The Tain of the Mirror: Derrida and the Philosophy of Reflection* (Cambridge, Mass. & London, 1986)

<sup>9</sup> Bernstein, R. J. *The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity* (Cambridge: Polity Press in Association with Basil Blackwell, 1991)

## 2. Philosophy, Politics, Critique

### 2.1 *Philosophical Criticisms*<sup>10</sup>

Deconstruction, when interpreted as a species of Postmodernism that levels the distinction between philosophy and literature, has predictably prompted vehement opposition. Critics complain that deconstruction tends to vastly oversimplify the object of its own critique (namely ‘western thought’ – that it relies upon crude conceptions of rationality, essence, universality, truth, history, representation, morality, etc)<sup>11</sup> and that it over-draws the instances of failure and limitation found there-in. The problem is exacerbated in two ways. First, in throwing away the modernist idea of rational critique, Postmodernism protects itself from counter-criticism; the very foundation from which criticism is made Postmodernism rejects and refuses to recognise. Secondly, freed from such constraints, Postmodern writers feel free to adopt a style of delivery that is playful, literary, ‘non-philosophical’, making arguments at best difficult to follow and at worst simply unintelligible in the ordinary philosophical or critical

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<sup>10</sup> The term ‘philosophical’ is used here to identify critique that focuses upon the way in which certain concepts are defined, distinguished and manipulated – including the concept of ‘philosophy’ itself and its relation to literature. Although philosophical critique is treated as different to political critique here, there are similarities. Just as some dismiss deconstruction for undermining the ‘political’ values of, say, social justice or human emancipation, others complain that deconstruction’s problematising the possibility of stating with certainty how things stand in reality undermines the values of philosophy (of clarity and certainty).

<sup>11</sup> Ellis, J. *Against Deconstruction* (New Haven, Conn.: Princeton University Press, 1989)



sense.<sup>12</sup> Critics regard the resistance to reductive simplifications of their own concepts of freeplay, *différance*, *differend* etc as little more than intellectual cowardice. Deconstruction resists the simple identification of signifier with signified and hence the simple definition of its own concepts, because ‘total’ meaning always escapes into further signification. Ellis challenges the purveyors of Postmodernism and deconstruction to show exactly what is lost by such a clarification in terms that can be understood and appreciated on the level of traditional criticism.<sup>13</sup> If this cannot be done, argues Ellis, then deconstruction will remain impenetrable and productive debate will always be impossible;<sup>14</sup> any ‘challenge’ which resists lucid and brief statement is no challenge at all.<sup>15</sup> But showing ‘exactly what is lost’ is itself not a simple matter for deconstruction, since this would in itself require a limit to signification.<sup>16</sup> This has led to an understandable feeling that Postmodernism and deconstruction shows a lack of sportsmanship, and in refusing to allow philosophy and criticism to engage it, lacks relevance and interest. However, as philosophers of deconstruction have pointed out, it is not always clear exactly who or what these critics are aiming their comments at.<sup>17</sup>

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<sup>12</sup> *Ibid.*, p.142

<sup>13</sup> *Ibid.*, p. 150

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, p.149

<sup>16</sup> That which Derrida notes in western thought as the Transcendental Signifier, concepts like Heidegger’s notion of Being, which calls a halt to difference in order that meaning can find a resting point.

<sup>17</sup> Deconstruction as a form of Postmodernism is a Rortyan interpretation, but this is not acknowledged in Ellis’s writings. Ellis is wrong to suggest that Derrida tries to ensure that

For Ellis and Eagleton, Derrida's writing tends to construct modernist notions such as essentialism and teleology as much more far-reaching and fixed than anyone really holds them to be. Essentialism is simply the "trivially, self-evidently true"<sup>18</sup> fact that things, including Postmodern theory, have certain essential qualities; indeterminacy at the borders and eternal doubt as to what is essential does not undermine this.<sup>19</sup> Essential qualities must be identifiable, argues Eagleton, otherwise words and concepts would have no meaning.<sup>20</sup> Similarly, says Eagleton, no-one believes that 'teleology' is the inevitable onward march towards enlightenment and freedom that the Postmoderns caricature it to be, but simply the notion that certain conditions are necessary for establishing certain other things.<sup>21</sup> Eagleton's point is that the only way in which Postmodern theory can attack modern philosophy's concepts is to read them in a way that is too far reaching and rigid to be of any use and hence ridiculously homogenising. The Postmoderns' own characterisation of the

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criticism can only be directed away from and never towards him. The characterisation of western thought as a set of binary oppositions, expressed in the speech/writing pair may in itself be simplistic, but the significance of this insight is not. The point is that meaning in the sense of full presence in part escapes binary oppositions. Therefore it is perhaps more accurate to say that criticism *itself* is made problematic, though of course this does not really assuage the critics' frustration. Eagleton argues that there is much less to Postmodernism and deconstruction than is first apparent from its difficult prose. Eagleton argues that Postmodern analyses of western thought grossly simplifies, thus contradicting its own rhetoric of plurality and heterogeneity. (See Eagleton (1996) *supra*, n.3, p.26).

<sup>18</sup> *Ibid.*, p.97

<sup>19</sup> *Ibid.*, p.99

<sup>20</sup> *Ibid.*, p.102-3

<sup>21</sup> *Ibid.*, p.106



history of western philosophy has this fault. It is “flatten[ed]” by the “same tedious saga” – all is homogenized into a universal story of metaphysics.<sup>22</sup> In other words, Postmodernism essentialises its object in the pejorative sense. Eagleton complains that, whereas the philosophers that Derrida deconstructs have taken pains to carefully construct an argument with sensitivity towards doubt and other points of view, Derrida’s characterisation of them as naïvely relying upon a false pedestal of speech and writing is a crude approach.<sup>23</sup> Ellis’s diagnosis is more damning still. He regards Derrida’s undermining of binary opposites as one crude simplification being replaced by another, and textuality being an “incoherent” notion.<sup>24</sup>

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<sup>22</sup> *Ibid.*, p.34

<sup>23</sup> *Ibid.*, p.26

<sup>24</sup> Ellis (1989) *supra*, n.11, p.140. For Ellis, this operation ignores a vast amount of important philosophical ‘grey’, and behind such obfuscatory notions as metaphysics of presence and *différance* lie very mundane, primitive and simplistic ideas (*ibid*, p.142) such as “look[ing] carefully”( *ibid*, p.144) at a text and accepting that one reader’s interpretation is not final – and who would be interested in a critical argument that simply said that? If it were not for Derrida’s pretentious and “tortuous prose” this would be recognised immediately (*ibid*, p.142-44). Ellis does not, however, engage with the specific details of Derrida’s deconstruction of western philosophers. To a lesser extent this is arguably also true in Eagleton’s case for, just as Derrida might be criticised for his generalisations, so Eagleton’s criticisms are often directed at “Postmodernism” and “deconstruction” without any serious effort to identity the relationship or differences between these labels. It is perhaps indicative of the uneasy (undecideable?) critical distance between ‘modern’ and ‘Postmodern’ theory that, despite complaining that Derrida’s characterisation of ‘Western Thought’ is too broad, blunt and simplified to have any real significance, their criticisms of deconstruction prefer to emphasise the problematic implications of textuality and *différance* rather than engage with the concepts philosophically. Ellis “fail[s] to engage with Derrida’s work beyond the most superficial, or second-hand level

## 2.2 Political Criticisms

The arguments variously made by Habermas, Searle and Rose in criticising deconstruction as an aspect of Postmodernism aim to cut it down at the level of its implications for political critique. Rose agrees with Eagleton that Derrida's deconstruction of the canons of western thought reduces its many different aspects to a caricatured 'history of writing'.<sup>25</sup> In his claim that western philosophy all relates to a metaphoric conception of 'writing', Derrida glosses over important areas of debate and mutes a rich history of ideas. For example Rousseau's *Confessions* is a text relating to a wide spectrum of social theory, but Derrida reduces Rousseau to a nostalgic who dreams of a non-existent utopic age of ideal speech.<sup>26</sup> Rose argues that the championing of the 'other' merely ensures that "[i]t is the abused who become the abusers"<sup>27</sup> since he merely reverses structures of coercion without any hope of emancipation. Fiss raises related concerns when he argues that Derrida's strategy of reducing forms of language to rhetorical turns is a road to nihilism.<sup>28</sup>

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of acquaintance." (Norris (1990) *supra*, n.7, p.139) Similarly Habermas's and Searle's Derrida as relativist apparently has more to do with their own limited intellectual grasp of the range of Derrida's work than deconstruction itself (*ibid*, p.49).

<sup>25</sup> Rose, G. *Dialectic of Nihilism: Poststructuralism and the Law* (Oxford: Blackwell, 1987) p.147-8

<sup>26</sup> *Ibid.*, p.141

<sup>27</sup> Rose (1996) *supra*, n.4, p.5

<sup>28</sup> Fiss, O. 'Objectivity and Interpretation' (1982) 34 Stanford L. Rev, pp.739-63



It is this concern for the possibility of political and ethical critique that motivates the fiercest criticisms. Eagleton contends that Postmodernism and deconstruction represent a fashionable retreat into irrelevance and a cutting off from the real concerns of the world.<sup>29</sup> The undermining of universal foundations means evils such as fascism cannot be resisted with any argument stronger than “the feebly pragmatic plea that fascism is not the way we do things in Sussex or Sacramento.”<sup>30</sup> The crux of Eagleton’s argument against Postmodernism is that it is a wrong-ended approach. Instead of seeing what are the urgent human problems of starvation, malnutrition, violations of human dignity, economic injustice and political oppression, Postmoderns simply turn the problems of

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<sup>29</sup> Eagleton (1996) *supra*, n.3, p.23. See also Edward Said, who argues that Derrida’s concern with textuality exposes “an extremely pronounced self-limitation”, since the idea that all is text shows no commitment to “knowledge” or “freedom, oppression or justice (Said, E.W. *The World, The Text and the Critic*, (Cambridge, Mass.: Harvard University Press, 1983) p.214. “[Deconstruction] is a pedagogy that gives the voice of teachers a kind of inverse and unlimited sovereignty allowing them to indefinitely rewrite the text.” ((1983:213); quoting Foucault, M. (1972) *Histoire de la Folie*, p.602).

<sup>30</sup> Eagleton (1996) *supra*, n.3, p.28; Similarly, Sheriff feels that Derrida’s exclusive focus upon writing cannot achieve more than the negative lesson that all meaning is vulnerable to further deferment and difference (Sheriff, J.K. *The Fate of Meaning: Charles Peirce, Structuralism and Literature*, (Princeton N.J. & Guildford: Princeton University Press, 1989) p. 32) and needs to be supplemented by an account of who is interpreting in order to enable political critique. Like Derrida, Peirce’s theory of meaning contends that no thought is original – one gives rise to another infinitely (*ibid*, pp. 127-9). However unlike Derrida, Peirce does not bracket the ‘real world’, but rather always takes account of *who* is interpreting (*ibid*, p.32) and therefore can positively account for differences of perspective.

moral fracture, relativism and dislocation into a virtue.<sup>31</sup> Therefore the Postmodern rejection of concepts such as universalism and teleology is motivated by the wrong concerns. Even if these tools are merely the charred remains of long-dead Eighteenth Century enlightenment humanist rationalism, they are nevertheless a better basis for arguments for emancipation and political action than the relativism of deconstruction.<sup>32</sup> Norris agrees with Eagleton and the others that there is no significant critical mileage in postmodernism's undermining of philosophical concepts, describing this approach as "a wholesale collapse of moral and intellectual nerve".<sup>33</sup>

Rose's engagement with Derrida's deconstruction of Marx suggest a similar frustration with the politically debilitating effects of undecidability. Rose is furious with Derrida's undermining of Marx's politically significant theorisation of the commodity. Whereas Marx has distinguished between real use-value and spectral exchange-value, Derrida collapses the distinction to reveal a world of "dim and doubtfully real persons"<sup>34</sup> and detracts from engagement with questions of power and politics.<sup>35</sup> The concept of the

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<sup>31</sup> Eagleton, *ibid.*, p. 32. See also Swain, S. 'Postmodern Narratives and the Absurdity of Law' in Earnshaw, S. (ed.) *Just Postmodernism* (Amsterdam-Atlanta, G.A.: Rodopi, 1997) pp.1-28, pp.6-7

<sup>32</sup> Eagleton, *supra*, n.3, p.104

<sup>33</sup> Norris, C. (2000) *supra*, n.7, p.19

<sup>34</sup> Rose (1996) *supra*, n.4, p.67

<sup>35</sup> *Ibid.*, p.70. Rose's own project, to which we shall return in the next chapter, is to plot the course between the singular experience of justice and law as institutional representation. Rose regards that distinctions such as that between use value and exchange value show us that there is possibility of conceiving such a course and hence a more just future. Prior to commodification there was a sensuous, singular object, free of corrupting exchange value, and



commodity as separate from the singular is important for this type of political critique. It provides a useful perspective on the modern bureaucratic state as the menacing result of the loss of control and alienation that commodification brings.<sup>36</sup> Since, for Derrida, the pre-commodified object was always missing – always commodified – we can never experience that singularity itself. Justice as a singular moment is experienced as the loss of singularity, since it can only be represented to us in law – a form that, in functioning through exchange and equivalence, will always be an injustice in the singular instance. Rose argues that this conception of justice engenders a situation of eternal despair. In later writings, Derrida's view of the work of mourning seems to accept Rose's vision of despair as a judgment of the international political landscape. In his response to the September 11<sup>th</sup> attacks, Derrida argues that the war on terror bears all the hallmarks of a trauma that can never be overcome: a mourning over a tragedy that has no definite end.<sup>37</sup> In a war on an enemy that has no particular nationality or power base the worst tragedy will always be to come: the spectres

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hence an experience of that which we might, without cynicism, call 'justice'. Thus there is the residual hope that, given enough time and hard work, the institutions of modern law can overcome the loss of this experience of singularity within law. When Derrida suggests that there probably never was an innocent, purely sensuous object prior to commodification, he cuts off all hope of overcoming the loss and thus of reconciling law as a system of representation with an ethics of singularity.

<sup>36</sup> Buchman, A.E. *Marx and Justice: The Radical Critique of Liberalism* (London: Methuen, 1982). See also Avineri, S. *The Social and Political Thought of Karl Marx* (Cambridge: Cambridge University Press, 1968) pp.17-24

<sup>37</sup> Borradori, G. *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* (Chicago, I.L. and London: University of Chicago Press, 2003) p.198

of chemical, biological and nuclear attack launched by an unseen foe upon the cities of America and its allies prevent mourning completing its work.<sup>38</sup>

### 3. Rorty, Pragmatism and Literary Deconstruction

The ‘literary’, or ‘poetic’ interpretation of deconstruction represented here primarily by the writings of Rorty, is one that prioritises literary notions of metaphor, narrative and rhetoric over philosophical truth, reason and critique. The distinction between the literary critic and the philosopher is broken down in the sense that all discourse, whether serious or non-serious, fact or fiction, is marked by the indeterminacy that Derrida describes as ‘writing’. In the place of serious philosophy, Rorty enthrones playful and stimulating uses of language that highlight the contingency of our language. At its best, claims Rorty, deconstruction allows us to appreciate the contingency of the rhetoric that we use, although it is highly problematic as a basis for political or ethical critique.

#### 3.1 *Rorty’s Theoretical Perspective*

Rorty’s interpretation of Derrida is a starting point for his own anti-foundational, anti-metaphysical, anti-essentialist, pragmatic perspective. He asserts that Derrida shows that all philosophy leads, not to rational foundation

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<sup>38</sup> *Ibid.*, p.197



and principle, but simply to more and more philosophy.<sup>39</sup> Since philosophy so conceived has no logical end point it should be regarded in the same way as the endless sprawl of poetry and literature – as just another “kind of writing”.<sup>40</sup> Rorty reiterates this point in *Deconstruction and Circumvention* where he dismisses philosophers who strive for truth as “loveable old-fashioned prigs”.<sup>41</sup> For Rorty, philosophy endlessly adds to what is already there – an infinite chain of supplements which cannot tell us the truth about the world any more than poetry. All that we know of the world is the way in which we speak about it for our own understanding and action. It is thus pointless to strive to understand the ‘truth’ or ‘essence’ of the questions that tax us, as any such truths can only exist as effects of linguistic ordering.<sup>42</sup> A Darwinian account of how leopards came to have spots on their fur is no more ‘correct’ than Rudyard Kipling’s<sup>43</sup> because there is no transcendental third position from which to make an objective comparison. Darwin and Kipling simply present different narratives, producing different effects with different applications. Rorty’s idea of pragmatic deconstruction is philosophically and morally relativist; no judgment between

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<sup>39</sup> Rorty, R. ‘Philosophy as a kind of writing: An Essay on Derrida’ in *New Literary History* (1978) Vo.10 pp.141-5; also printed in McQuillan, M. *Deconstruction: A Reader* (Edinburgh: Edinburgh University Press, 2000) p.125

<sup>40</sup> McQuillan, *Ibid.*, p.123. Gasché regards Rorty to have misinterpreted Derrida’s idea of ‘writing’ to mean ‘literature’. Gasché insists that, rather than having any such essence of its own, writing merely “accounts for the necessary corruption of the idealities, or transcendentals of all sorts...” (Gasché (1986) *supra*, n.8, p.274)

<sup>41</sup> Rorty, R. ‘Deconstruction and Circumvention’ in Rorty, R. *Essays on Heidegger and Others: Philosophical Papers Vol. 2* (Cambridge: Cambridge University Press, 1991) p.85

<sup>42</sup> Rorty (1989) *supra*, n.6, p.5

<sup>43</sup> See Kipling, R. *How the Leopard Got His Spots* (London: MacMillan, 1972)

language's metaphors is possible except insofar as what we happen to prefer at any given time.

Despite finding his pragmatic perspective in Derrida's prioritisation of writing over speech, Rorty disconnects this rather more philosophical aspect of Derrida from his own pragmatism.<sup>44</sup> Rorty's own concern, which he claims is different both to Derrida's early metaphysical philosophy and to his later, more 'poetic' work,<sup>45</sup> is to increase the reach of American liberal democracy through "public rhetoric".<sup>46</sup> For Rorty, this involves working to realize the hopes of liberal societies and combat human cruelty, through pragmatic, poetic re-descriptions of ourselves. What is important, insists Rorty, is not the accuracy or truth of any of these descriptions, but the interest and usefulness that they have for us in this task.<sup>47</sup> Rorty uses Derrida (and also Nietzsche and Foucault) as an example of the kind of person that understands the value of contingency.<sup>48</sup> For such people 'discoveries' and 'insights' of science or philosophy are actually just "metaphoric re-descriptions".<sup>49</sup> The change of perspective is effected not

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<sup>44</sup> For Rorty, the implication that *différance* dictates a *law* of language shows a dangerous tendency for Derrida to "imitate the thing he hates" (Rorty (1991) *supra*, n.41, p. 93) rather like Orwell's Napoleon and the other pigs when they begin to walk on two legs at the end of *Animal Farm* in imitation of their deposed former master, Farmer Jones.

<sup>45</sup> Rorty, R. 'From Ironist Theory to Private Allusions: Derrida' in Rorty (1991) *supra*, n.41, p.125. See also Rorty (1989) *supra*, n.6, p. 65, pp.94-5

<sup>46</sup> Rorty (1989) *ibid.*, p. 85

<sup>47</sup> *Ibid.*, pp.85-6

<sup>48</sup> *Ibid.*, p.46

<sup>49</sup> *Ibid.*, p.16



because the former description was wrong, but because people find a new description more interesting or useful.<sup>50</sup>

The extent to which Derrida's own works support a pragmatic or relativistic perspective is debatable. The previous chapter interpreted Derrida's deconstruction of Plato as prioritising metaphor over philosophy. In his essay on Levi-Strauss, Derrida provides ammunition for Rorty's interpretation of deconstruction as creating an infinite expanse of writing, in which play of meaning is infinite. Here, Derrida describes the rupture of western philosophy's centeredness:

“This was the moment when language invaded the universal problematic, the moment when, in the absence of a center or origin, *everything became discourse* – provided we can agree on this word – that is to say, a system in which the central signified, the original or transcendental signified, is never absolutely present outside a system of differences. The absence of the

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<sup>50</sup> *Ibid.*, p.17. The very basic deconstructive notion of meaning as excessive of attempts to understand it fully has spawned many disciples. Bruns adopts Bakhtin's idea of language as a stratification of intermingling, heterogeneous discourses to argue that “understanding” the law entails understanding it in its contingency Bruns, G.L. *Tragic Thoughts at the End of Philosophy: Language, Literature and Ethical Theory* (Illinois: North-Western University Press, 1999) p.65. It makes sense, he argues, to think of language anarchically because this allows one to create a space for radical questioning and escape the limitations of the “prison-house” of analytic philosophy (1999:67).

transcendental signified *extends the domain and the play of signification infinitely.*” [emphasis added]<sup>51</sup>

Derrida seems to be describing something akin to the biblical Fall of Man: the mythic origin of Man’s first vain attempt to grasp at the root of true knowledge, and his subsequent eternal separation from it.<sup>52</sup> Support for this reading is arguably to be found in Derrida’s essay on the “white mythology” of western philosophy – the myth that first there was philosophy, which masters and uses metaphor to deliver its argument. It is the myth that philosophers may use metaphorical language to illustrate their concepts, but simultaneously keep metaphor at arm’s length; that despite playing a central role in philosophical argument and reflection, metaphor remains exterior to philosophy. Such a belief in the exteriority of metaphor and originality of philosophy is a myth, because, as Derrida argues, there can be no access to concepts without “figurative representation”.<sup>53</sup> Each time the philosopher gives an explanation of anything he must rely upon figurative representation. So philosophical concepts find their own origin in metaphor – an origin that is forgotten because the language is

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<sup>51</sup> Derrida, J. *Writing and Difference*, Bass, A. (trans.) (London and New York, N.Y.: Routledge, 2002a) p.354

<sup>52</sup> See Genesis 3

<sup>53</sup> Derrida, J. ‘White Mythology: Metaphor in the Text of Philosophy’ in Derrida, J. *Margins of Philosophy*, Bass, A. (trans.) (Brighton: The Harvester Press, 1982) p.207. Derrida suggests, for instance, that as a movement from one signified meaning to another, philosophical ‘insight’ shows itself to be founded on a metaphor of “darkness and light” (Derrida (2002a) *supra*, n.51, p.31). The grasping of philosophical truth is expressed as a repetition of the emergence from Plato’s cave.



adopted and put into use by philosophy.<sup>54</sup> Derrida argues that even if one were to investigate and expose all philosophical uses of metaphor, this will imply a philosophical system which will have a metaphorical origin that is not itself accounted for. One metaphor always escapes, because being contained within the grounds upon which a given critique is built, it cannot itself be subject to critique.<sup>55</sup> The implication of this is that it is impossible for philosophy to dominate metaphor or to sustain an essential distinction between truth and metaphor or philosophy and poetry. ‘Truth’, then, is the product of metaphor and so is a shifting, indeterminate notion. As Nietzsche famously put it, ‘truth’ is nothing but...

“...a mobile army of metaphors... a sum of human relations which became poetically and rhetorically intensified,... and after long usage seemed to a nation fixed, canonic and binding; truths are illusions of which one has forgotten that they are illusions.”<sup>56</sup>

Derrida’s proximity to Nietzsche’s position is also a contested question, and Rorty’s interpretation has many opponents. However, Rorty’s idea that Derrida’s interrogation of binary oppositions breaks down the distinctions between philosophy and metaphor, truth and rhetoric, fact and value – leaving

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<sup>54</sup> Derrida (1982) *supra*, n.53, p.211

<sup>55</sup> *Ibid.* p.219-20

<sup>56</sup> From Nietzsche, F. ‘On Truth and Falsity in Their Ultramoral Sense’ quoted by Derrida (1982) *supra*, n.53, p.217

political and moral action without any foundation except as simply that which we do, believe or think in a certain community at a given point in history – is enthusiastically adopted by theorists such as Stanley Fish. For these theorists, the anti-foundational ‘pragmatic’ approach has positive implications for political and ethical thinking. Fish’s argument is that no philosophical explanation can be prior to rhetorical language, but that this ‘fact’ has not persuaded scholars to give up the dream of establishing philosophical truth. As for Rorty, so for Fish there is nothing self-evidently true; all knowledge is produced by rhetoric and interpretation which could change to produce new and different truths when required.<sup>57</sup>

### *3.2 Political Significance of Pragmatism and Literary Deconstruction*

What are the ethical or political implications of interpreting Derrida as inverting the philosophy/metaphor and truth/rhetoric oppositions? If deconstruction brings all discourse down to the level of more or less edifying rhetoric, then what kind of political, legal or ethical system remains? The problem of prioritising rhetoric over literal (or ‘true’) meaning is acknowledged by other theorists who attempt to head off the accusations from philosophers that

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<sup>57</sup> Fish characterises “the history of western thought” as the eternal battle between the “serious man” of philosophy and “rhetorical man” (Fish (1989) *supra*, n.5, pp.482-4). Fish contrasts Derrida with Habermas, Austin and Searle who believe (wrongly, Fish asserts) that philosophy promises the discovery of truth (*ibid*, p.498). “Whatever is invoked as a constraint on interpretation will turn out, upon further examination, to have been the product of interpretations” (*ibid*, p.512).



deconstruction's notions of textuality and *différance* make it nihilistic.<sup>58</sup> Deconstruction as the leveller of truth and metaphor cannot work for a political or ethical theory because, as the critics below argue, political struggle and ethical demands require a stronger foundation than the infinitely indefinite play of metaphor that this reading of deconstruction offers. For Derrida there is no possibility of invulnerability to the failure of definite meaning, but as Sheriff argues, this is not an insight of any political significance unless the particular strategies involved in the interpretation of a text or an event can be investigated.

Rorty's political impetus is that the construction of metaphysical foundations of morality and human nature are not useful for actually achieving the freedom that they promise. Rorty insists that the reduction of discourses about ourselves and the world to poetic imaginings makes possible an infinite

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<sup>58</sup> Bill Readings admits that converting deconstruction into any political theory would require it to definitively ground a particular interpretation of the world and its needs, thus immediately contradicting its own foundation that there can be no halt to the play of *différance* (Readings, B. 'The Deconstruction of Politics' in Waters, L. and Godzick, W. (ed.) *Reading de Man Reading* (Minneapolis: University of Minnesota Press, 1989) pp. 223-44. See also McQuillan (2000) *supra*, n.39, pp. 388-396, pp. 389-90). Similarly, Spivak regards that deconstruction cannot directly ground any political programme except for a "wishy-washy pluralism on the one hand or a kind of irresponsible hedonism on the other." (Spivak, G. C. 'Practical Politics of the Open End' in McQuillan (2000) pp. 397-404, p. 398. See also Spivak, G. C. 'Revolutions that as Yet Have no Model' in *Diacritics* (1980) vol. 10 pp. 24-49). Critchley remarks that, whilst Derrida's deconstruction provides tools for criticism and undermining legitimacy, it provides no basis for positive, decisive political decision. Derrida can only conceive the "instant of decision [as] madness" (Quote from Derrida (2002a) *supra*, n.51, p.36) and as such reaches an impasse (Critchley, S. *The Ethics of Deconstruction* (Oxford and Cambridge, Mass.: Blackwell, 1992) pp.199-200).

range of potentially fruitful political and ethical debate that ‘serious’ philosophy only serves to obstruct. Rorty believes that what is left after this insight is accepted is the liberal hopeful ideal of ‘freedom’, which he refers to with Fukuyaman fatalism: “...western social and political thought may have had the last conceptual revolution it needs”.<sup>59</sup> Rorty states that liberalism’s core value is freedom for people to create their own self-identities, and whatever discourse helps to encourage this should be itself encouraged. Freedom can only be promoted effectively by adopting an attitude of “ironism” - that all forms of culture that may be appropriated dialectically to create new forms of self-image, ethics and politics.<sup>60</sup> No foundational ground for achieving this goal is any more valid than any other (including human rights), except insofar as the usefulness and interest they bring for people exercising their freedom of self-creation.<sup>61</sup> Rorty is certain that different communities of people will adopt whatever metaphorical descriptions suit their needs on all forms of organisation. On this account, there is no need for philosophical theories of ethics and morality. Such matters are entirely contextual, historical, contingent.<sup>62</sup> Political and moral philosophies can give us images of a possible future – say of all people living together in peace and security – but their theorisations on human nature should only be adopted if we find them useful for actually achieving this future.<sup>63</sup>

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<sup>59</sup> Rorty (1989) *supra*, n.6, p. 63

<sup>60</sup> *Ibid.*, p. 83

<sup>61</sup> *Ibid.*, p.84-5

<sup>62</sup> Rorty (1991) *supra*, n.41, p.192

<sup>63</sup> Rorty, R. ‘Human Rights, Rationality, and Sentimentality’ in Shute, S. and Hurley, S. *On Human Rights: The Oxford Amnesty Lectures* (New York, N.Y: Basic Books, 1993) p.118



As well as the concern to realise individuals' freedom, a second concern central to Rorty's project is the problem of human suffering. His arguments on the political impetus of liberal ironism accept that humiliation and hurt are wrongs which must be alleviated. For Rorty it is the foundationalist questions such as 'how do you *know* that?' and " 'why should I not hurt another?' " <sup>64</sup> and what is "the nature of man"? <sup>65</sup> that are irrelevant to politics because they simply get in the way of creating better worlds. Relevant questions are " 'why do you talk that way?' " <sup>66</sup> since liberal ironists are concerned about what causes suffering and how to avoid this. <sup>67</sup> He identifies "our" western liberal culture of human rights as "morally superior" <sup>68</sup> to other cultures, but not because 'we' in the west have any special knowledge about human nature that others fail to grasp, but because the discourse of liberal democracy is more effective than other discourses for realising freedom and reducing suffering. Kantian moral philosophy is itself deemed to be implicated in the dehumanising violence against those considered as mere "pseudohumans" <sup>69</sup> since, as Rorty points out, the identification of one's enemy as something less than human is often used by aggressors to justify cruelty. Simply on practical terms, it does no good "to get such people to read Kant, and agree that one should not treat rational agents simply as means" because what it means to be human is relative to a *particular*

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<sup>64</sup> Rorty (1989) *supra*, n.6, p.91

<sup>65</sup> *Ibid.*, p. 8

<sup>66</sup> *Ibid.*, p.51

<sup>67</sup> *Ibid.*, p.91

<sup>68</sup> *Ibid.*, p.116

<sup>69</sup> *Ibid.*, p.112

community.<sup>70</sup> Since most people, insists Rorty, define themselves, not as human beings per se, but as “a certain good sort of human being”, universal declarations on human nature cannot convince.<sup>71</sup> However, it is not clear that what one might describe as Rorty’s strategic, ironic, culturally relative liberalism provides any greater hope of convincing such people.<sup>72</sup> If, as Rorty contends, what is right and wrong is entirely contingent upon local practises, then on what grounds can anyone complain about, say, institutional sexism and racism? Bernstein asserts that Rorty’s ethnocentricity provides no answer to such questions.<sup>73</sup> One answer that Rorty does give, with which he threatens to undermine his own ironism, is that if there is a call for political or ethical action “we” will recognise it. He writes: “It is part of the tradition of our community that the human stranger from whom all dignity has been stripped is to be taken in, to be re-clothed with dignity.”<sup>74</sup> Rorty’s assertion is confusing because it appears to rely on accepting what can only be described as a matter of fact – that this is an accurate description of our community. Furthermore, precisely which community is Rorty referring to here, and which traditions? On this point Rorty is vague.<sup>75</sup>

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<sup>70</sup> *Ibid.* p.124

<sup>71</sup> *Ibid.* p.126

<sup>72</sup> Pool, S. Review article in *Review* p.31, *The Guardian*, 12/4/03

<sup>73</sup> Bernstein (1991) *supra*, n.9, p. 242-3

<sup>74</sup> Rorty (1991) *supra*, n.41, p.202

<sup>75</sup> Bernstein notes that this could refer to any number of communities, none of which Rorty defines or differentiates – “we liberals”, “we pragmatists”, “we inheritors of European civilisation”. It is naïve because it assumes that ‘our’ traditions are predominantly benevolent. For Bernstein, the traditions associated with these communities might involve elements of



It seems that Rorty's reply defeats his own insistence that the old metaphysical shackles can be kicked away (and hence his reading of deconstruction as doing so), because he gives no indication as to how he can be sure that we would recognise the need for ethical or political action without access to certain metaphysical idealisations about what is right and wrong. In an effort to confirm his anti-metaphysical credentials, Rorty draws a distinction between a theoretical "foundation" and a "summary". Rorty characterizes the former as metaphysical claims to truth; the latter he regards as our "culturally influenced intuitions about the right thing to do".<sup>76</sup> He argues that the tendency to summarize rather than build foundations is indicative of a 'Darwinian' desire to look to building a better future rather than dwell, vainly on our true nature as humans. This desire, coupled with increased wealth and security, has apparently "made possible an unprecedented acceleration in the rate of moral progress" since the French Revolution.<sup>77</sup> What is most startling about Rorty is the grand sweep of his style. Despite locating the force of his claim within the contingency of history rather than eternal or universal truths, his lack of attention to contingent detail is breathtaking. If we are to refuse all transcendental idealities, by what measure are we to judge Rorty correct on his assertion of 'unprecedented' moral development in recent years? If this judgement is to be made without metaphysics, where is the historical

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kindness and hospitality, but they also involve cruelty and violence towards outsiders. Despite being deployed uncritically as a fact in an argument in which there are supposedly no facts, this 'we' is not problematised at all (Bernstein (1991) *supra*, n.9, p.247), and there is no suggestion in Rorty that it is anything other than a grander "me".

<sup>76</sup> Rorty in Shute and Hurley (1993) *supra*, n.63, p.117

<sup>77</sup> *Ibid.*, p.121

scholarship to support his claim? Unfortunately, there is none: Rorty wants to convince his audience by the sheer pace and common-sense appeal of his rhetoric. He reminds us that slavery is wrong and now western liberal societies do not deal in slaves; similarly that genocide and torture are bad things and now we accordingly have the Geneva Convention. Written into the crucial ideas of ‘cruelty’ and the ways of addressing it, is a foundational, metaphysical claim because, like A.J. Ayer’s verification principle, it is something that itself escapes the kind of totality that the author’s logic requires. As Critchley points out, this would suggest that Rorty is closer to the philosophical Derrida, whose later work is dominated by a concern for transcendental responsibility and otherness, than he imagines.<sup>78</sup>

Other pragmatists fall into the same trap of falling back upon transcendental norms while at the same time insisting that such norms are unnecessary. For instance Pitkin takes great care to construct an argument that one’s understanding of justice is always determined by the linguistic context in which one lives. Objects are created by, rather than simply labelled by, language and notions such as ‘fairness’, ‘justice’ and ‘God’ do not exist for a person until they have learned how they are spoken about in their community.<sup>79</sup> Hannah Pitkin shows this in operation in Plato’s *Republic*, in which, she argues, the differing definitions of justice given by Socrates and Thrasymachus result from playing different language games. Socrates, playing the ‘ought’ game, describes

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<sup>78</sup> Critchley *Ethics-Politics-Subjectivity* (London and New York, N.Y.: Verso, 1999) p.97

<sup>79</sup> Pitkin, H. *Wittgenstein and Justice* (Berkeley, C.A.: University of California Press, 1972) p. 109; hence the many different words in Inuit languages for distinguishing types of precipitation that in English is simply known as ‘snow’.



justice as a situation in which everyone does that which is appropriate to him.<sup>80</sup>

Thrasymachus, playing the ‘is’ game, looks around him and sees that actions done in the name of ‘justice’ display only self-interest and pursuit of power.<sup>81</sup> Is the dispute between the two figures in Plato’s text just a matter of linguistic difference? If the answer were to remain consistent with the rest of her argument then this would be the case, but like Rorty, Pitkin recognises that this would close down the possibility of political judgment and therefore raising the risk of making her book irrelevant to critical thinking. She writes: “We are always potentially able to pry the idea loose from some particular example... the possibility for critical thought and remedial action is always there”.<sup>82</sup> If this disconnection from linguistic context is always possible, then at some undefined point, meaning surely becomes transcendental. Meaning loses its mundane, pragmatic source (particular use of language) and once again becomes a mysterious and metaphysical ideal which ‘we’ somehow come to understand independently of our context. Diamond’s pragmatism further illustrates the difficulty of maintaining a critical perspective without metaphysical assumptions. Why, asks Diamond, is it generally considered wrong to eat people? Diamond explains that what makes it ‘wrong’ is simply that people are not generally regarded as things one eats. Anyone living in a modern western society who thought and acted differently would be committing a violation of deeply ingrained western norms, but this does not mean that eating people is a

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<sup>80</sup> *Ibid.*, p.169

<sup>81</sup> *Ibid.*, p. 178

<sup>82</sup> *Ibid.*, p. 191-2

universal wrong.<sup>83</sup> Would Diamond be equally enthusiastic about applying this relativism to, say, genocide, rape and torture? If so then surely pragmatism has no critical bite at all. If not, we must yet again allow an uncontested metaphysical assumption as to the special position of human beings as compared to animals to enter our framework. I would suggest, therefore, that Critchley is correct to argue that pragmatism and relativism do not allow us to actually throw away our metaphysical assumptions.

There remains a case to be made for the deconstructive levelling of the distinction between truth and rhetoric on political and grounds which can be distinguished from Rorty's attempts to tackle the practical issues of suffering and freedom. For all his radical rejection of the hallowed notions of truth and serious critique, Rorty's writings are characteristically 'political' in the traditional sense of attempting to move beyond 'pure' theory in order to influence practical or *real* change in the world. There is in Rorty, therefore, a crucial distinction between pure theory (or 'text') and practical action which is ripe for deconstruction. It is exactly this limitlessness of deconstruction – the unending collapsing of conceptual hierarchies – that Derrida's critics condemn as the enemy of political discourse (or 'action' as opposed to endless 'talk').<sup>84</sup> However, I am trying to suggest that this very limitlessness itself has a political edge. To describe it requires a certain shift in our understanding of the idea of the political. If the political can itself be textual, then political theory must be

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<sup>83</sup> Diamond, C. 'Eating Meat and Eating People' in Diamond, C. *The Realist Spirit:*

*Wittgenstein, Philosophy and the Mind* (Cambridge, Mass.: MIT Press, 1995) p.322

<sup>84</sup> Or as Dickens describes the interminable proceeding of the Court of Chancery in *Bleak*

*House*, "the sickness of hope deferred" (London and New York, N.Y.: Penguin Books, 1985)

p.399.



understood, not so much as a direct employment of ‘theory’ to bring about ‘real’ change, but instead as an indeterminate questioning and reopening of our perspectives and attitudes. This is not to say that such a process does not have any application to the ‘real’, but the relationship between the ‘real’ world and our interpretations of it also becomes a matter for interpretation and reinterpretation. To regard such an understanding of political theory as making any sense, we are required to reconsider our expectations of it. What political theory as a deconstruction of the text/real distinction can achieve is clearly different from what, say, Eagleton regards as the duty of theory to provide a platform for condemning and outlining solutions to material deprivations. However, although clearly different to Eagleton, it may be a mistake to assume that a ‘deconstructive’ notion of the political is *radically* so. It really depends upon what one regards as making a difference in the realm of discussion of such matters. It is perhaps trite to point out that the controversy in matters that might be described as political – e.g. the Israel-Palestine question – lie in the linguistic categorisation and interpretation of events. Such interpretations may lead in turn to further interpretations and further events. But that which we call an ‘event’ and that which we call an ‘interpretation’ of an event itself suggests a conceptual ordering of things. The concern with the textuality of both sides of this order – the concern that Edward Said criticises as deconstruction’s unfortunate limitation – prevents any one given interpretation to claim supreme status by moving outside of or above textuality. Political ‘action’ traditionally gains its force by distancing itself from the play of textuality; political action moves outside of textuality inasmuch as it deals with the real world of referents rather than the textual world of signifiers. On this view language is regarded

merely as a vehicle for finding the truth about the world and its needs. Arguments are made and interpretations given, but only insofar as these apparently give us the true picture of the world at the end of the day. Once research has revealed, say, the material conditions of the poor or the state of the environment, then the real action of alleviating poverty or limiting global warming can begin. So rhetoric is deployed in order to uncover the literally true and objective properties of things.<sup>85</sup> But Bill Readings points out that, if rhetoric is necessary to secure literality then ‘literal meaning’ as a movement outside the text is itself a process of rhetoric and metaphor.<sup>86</sup> Euben regards the refusal of political activists, scientists, logical positivists, etc to recognise the necessary interconnectedness between the ‘real’ and ‘textual’ worlds as “*the American metaphysics.*”<sup>87</sup> Readings regards this insight not as signalling deconstruction’s descent into nihilistic irrelevance, but as taking responsibility for the effects of interpretations of the world and for the possibility that our ‘texts’ might reveal meanings that we did not anticipate.<sup>88</sup> It implies, not a movement purely inside endless signification and textuality and thus inaction, but to an “interdependence and mutual contamination” of signifier and signified. Deconstruction’s contribution to political and ethical debate will therefore always be controversial, since it operates to re-open questions that may otherwise be considered closed. It is in this constant re-opening that the transcendental aspect

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<sup>85</sup> Readings in McQuillan (2000) *supra*, n.58, p.393

<sup>86</sup> *Ibid.*, p. 394

<sup>87</sup> Euben, J. P. ‘Political Science and Political Science’ in Green, P. and Levinson, S. *Power and Community: Dissenting Essays in Political Science* (New York, N.Y.: Vintage Books, 1970) pp. 3-58, p.19.

<sup>88</sup> See Critchley, S. (1992) *supra*, n.58, p.44-5



of deconstruction becomes apparent, since it points towards an infinite responsibility to risk moral censure by questioning accepted norms. In the context of recent political debates, one thinks of the controversy created by Thabo Mbeki in 2003 when he voiced doubts that HIV necessarily leads to AIDS, or the controversial advocacy by Barry Groves and others of a fatty, carbohydrate-free diet for losing weight.<sup>89</sup> Of course it is possible that such critique is motivated not by a feeling of responsibility but rather a desire to escape it. However, in exposing accepted ‘facts’ (HIV leads to aids; carbohydrates are healthier than fat) to the suggestion that they are produced through political, cynical rhetoric, it is possible to appreciate an anti-cynical attitude in deconstruction. Critics of deconstruction may reasonably suggest that such questioning only further illustrates how unhelpful the idea of textuality of meaning is for the real world of decisions and action. The unceasing operation of indeterminacy of textuality has no moral compass except for the refusal to let one discourse claim natural dominance, so it cannot choose which voices to deconstruct and which to leave alone. The observations of Ward and Levinson on the positive political consequences of the levelling of distinctions are relevant here. For Levinson, blurring the distinction between fact and value is a necessary first step towards political responsibility.<sup>90</sup> As Ward argues, when the

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<sup>89</sup> <http://www.second-opinions.co.uk/eatfat.html>

<sup>90</sup> His political comments start from the same base as those of Stanley Fish: that there can be no judgment that is free of rhetorical and historical contingencies, so the simple distinction between fact and value is not meaningful (Levinson, S. ‘On Teaching Political Science’ in Green and Levinson (1970) *supra*, n.87, pp. 59-84, p.68). Any judgment, no matter how apparently objective and impartial, will be produced through a value-laden, rhetorical deployment of language. Levinson dismisses as “naïve” the belief that principles can be

distinctions that philosophers regard as important are broken down, questions of ethics and politics can be seen as textual; as such there is a greater opportunity to address questions and discourses that are ‘buried’ by dominant western discourse. In this sense of calling into question dominant voices, deconstruction is “innately political”,<sup>91</sup> and a “positive and creative force”<sup>92</sup> in drawing attention to the presence of the silenced, subordinated ‘other’ in all conceptions of justice.<sup>93</sup> The concern here is for a functioning definition of the political. In our examination of Rorty’s pragmatism, political discourse is that which employs certain arguments and rhetoric to achieve a particular end. The unceasing ‘textualisation’ of the ‘real’ that Ward has in mind appears to have turned the notion of the political back upon itself. No longer a simple directing of text towards a chosen goal, the undermining of hierarchisation as a political

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understood objectively, independently of their consequences in the context of their use.

Political responsibility always demands awareness of the consequences of action, not just of a set of deontological principles (*ibid*, p.71).

<sup>91</sup> Ward, I. *Kantianism, Postmodernism and Critical Legal Thought* (Dordrecht and London: Kluwer Academic Publishers, 1997) p.74

<sup>92</sup> *Ibid.*, p.72

<sup>93</sup> Ward is particularly interested in the potential that deconstruction has in rupturing the homogenising “us” of western thought has been brought into question by the atrocities of the Twentieth Century (namely, for Ward, the holocaust). Douzinas echoes this optimism in his Postmodern theorisation of Human Rights. For Douzinas, the “continuous flight of meaning” identified by deconstruction actually encourages the development of new ways to assert oneself politically: the resulting “groundless” ethics allows for the creation of new rights (Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000) p.347).



practise in itself seems to undermine our understanding of politics as a movement out of text towards the real.

#### **4. Deconstruction as Philosophy**

The version of deconstruction found in Derrida's texts by critics such as Norris and Staten could not be more different to the one found by Habermas or Eagleton discussed above. Where the latter find levelling, relativism, obfuscation, philosophical disabling, poeticisation, over generalisation and simplification, Norris and others find specificity, careful reading, attention to detail, preservation of theoretical distinctions, commitment to modernist notions of truth and philosophical argument. In an apparently amazing feat of reinterpretation, critics of this camp have produced a version of deconstruction that bears almost no relation to that dismissed by Ellis as a lazy substitute for critical thinking or celebrated by Rorty as ironic, private fantasy. However, although he interprets deconstruction as a serious philosophy, Norris refuses to reduce deconstruction to a systematic philosophical method. Achieving this balance has involved dissociating Derrida's deconstruction from anything too antithetical to the values of modern philosophy while preserving some of its enigma. Hence Norris takes great care to establish the difference between deconstruction on the one hand and Postmodernism and literary theory on the other, and attention is drawn towards passages in which Derrida himself admits to the importance of the concepts and transcendental signifieds of Philosophy and criticism. As shall be maintained here, the extent to which such attempts to 'philosophicate' deconstruction and give it a respectable philosophical

makeover are successful is very much a question of emphasis. Just as Ellis and Eagleton in their attacks, Norris presents his defence of deconstruction in a polemic fashion. For Norris, the critics who think of deconstruction as leading to relativism are simply reading Derrida wrong. There is no suggestion that Derrida's more far-reaching comments – on undecidability, differance, writing or supplement – give weight to the idea of deconstruction as a kind of relativism. In responding to the fierce criticisms outlined above, it would seem that Norris has a Herculean task in reinterpreting deconstruction as philosophically acceptable.

#### 4.1 *Prising Deconstruction Away from Pragmatism*

The philosophical defence of deconstruction against its critics has tended to involve showing that Rorty's pragmatic deconstruction is a misinterpretation of Derrida and his significance. Amongst the philosophers of deconstruction there is a broad agreement that any theoretical position that leads to relativism and freeplay is unhelpful for political and legal theory. However, *contra* Rorty, there is a determination to show that it is not deconstruction, but the less rigorous Postmodernism and literary theory that are to be criticised on this account.<sup>94</sup> Therefore theorists of philosophical deconstruction try to distance deconstruction from the appropriation of it by Rorty, Fish and literary critics and hence redirect criticism onto them.<sup>95</sup>

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<sup>94</sup> See Norris (1990) *supra*, n.7, p.139

<sup>95</sup> As philosophers, they do not allow deconstruction to follow the path forged by Fish and Rorty towards relativism. While Rorty emphasises Derrida's discarding of philosophical



It is of this double-bind that the more ‘philosophical’ Derrida warns: that even anti-foundational thought is metaphysical by virtue of its own blindspot – its own uncritically assumed foundation.<sup>96</sup> Philosophers of deconstruction such as Gasché, Norris and Critchley regard that Derrida’s more metaphysical tendencies are his saving grace. For example, Derrida’s distinctly Levinasian perspective on justice and otherness<sup>97</sup> leads Critchley to find public critical significance in his later transcendental metaphysics. Critchley thus rejects Rorty’s reduction of Derrida to a pragmatist with dispensable metaphysical leanings on the grounds that, without these leanings, Derrida’s work would not have the ethical or political significance that it does.<sup>98</sup> Likewise, Gasché and Norris insist that deconstruction cannot be reduced to labels such as ‘freeplay’ and ‘textuality’.<sup>99</sup> These have been “promiscuously” used, not by Derrida, but

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structures, others argue that Derrida remains faithful to them (albeit in an anti-foundationalist way). Critchley observes that Derrida, like Habermas, suggests that speech-acts are presupposed by a universal, *a priori* ‘promise’, even if this promise is (and it is) broken (Critchley (1999) *supra*, n.78, p.107)

<sup>96</sup> *Ibid.*, p.117

<sup>97</sup> Like Levinas, Derrida identifies ‘justice’ with the infinite demand of the other, which can never be fully satisfied or systematised in law. See Derrida, ‘The Force of Law’ in Cornell, D. *Deconstruction and the Possibility of Justice* (New York, N.Y. and London: Routledge, 1992) Chapter One.

<sup>98</sup> Critchley (1999) *supra*, n.78, Chapter Five: ‘Metaphysics in the Dark: A Response to Richard Rorty’; We discuss Levinas in more depth in the next chapter.

<sup>99</sup> Gasché, *supra*, n.8, p. 123: “Deconstruction is not a non-method; an invitation to wild and private lucubrations.”

by those who interpret deconstruction as primarily literary.<sup>100</sup> Philosophers interested in deconstruction complain that, in the hands of literary critics, deconstruction becomes too easy; its suggestion that meaning and significance are metaphorical and rhetorical surrenders too much of what is important in philosophy and renders deconstruction too easy a target for accusations of over-generality.<sup>101</sup> Gasché is adamant that deconstruction must be rescued from its abuse by “naïve”<sup>102</sup> literary critics and brought into its rightful home of philosophy. If, as Derrida contends there is “nothing outside the text”<sup>103</sup> then this means that the critic is herself part of the ongoing process of textuality. It is

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<sup>100</sup> *Ibid.*, p. 255. In this regard, Norris regards that Ellis “mistakes his target” (Norris (1990) *supra*, n.7, p.139). *Contra* Habermas, Norris contends that Derrida wants to show, not that *either* serious speech acts are entirely self-sufficient or *else* they entirely fail, but that they do *both*, demonstrating the condition of meaning as never quite saturated (*ibid*, p.144). Searle and Habermas are correct to assert that ‘parasitic’ and ‘serious’ speech acts have different effects, but at the same time the serious speech-acts demonstrate failure as well in being shot through with “accidence” and iterability (*ibid*, p.66). What deconstruction teaches us, on this more philosophical reading, is definitely *not* that philosophy becomes a kind of poetry, but that there is an interchange between the discourses that makes the strict separation of them unviable (*ibid*, pp. 73-4). The worrying political and ethical implications that Habermas and Eagleton identify with deconstruction are thus misdirected.

<sup>101</sup> If Derrida’s own texts were properly read, then it would be clear that the traditional western idea of good theory – rigorous, painstaking, specific and consistent – is also true of Derrida’s idea of deconstruction (*ibid*, p.139). Again, Norris simply redirects the criticisms, this time onto the critics themselves.

<sup>102</sup> Gasché, R., ‘Deconstruction as Criticism’ *Glyph: John Hopkins Textual Studies* (1979) Vol. 6, pp.177-215, also printed in McQuillan (2000) *supra*, n.39, pp.129 – 131, p.129

<sup>103</sup> Derrida, J. *Of Grammatology*, Spivak, G.C. (trans.) (Baltimore: John Hopkins University Press, 1998) p.158



a misunderstanding to think that one can accept this notion and then directly apply deconstruction's techniques to approach the meaning of a text.<sup>104</sup> If one were to accept Norris's view that deconstruction has been abused by relativists and literary theorists then it would seem that Sheriff's criticism that deconstruction merely shows infinite deconstructability is misplaced.<sup>105</sup>

Norris's redirection of criticisms onto Postmodernism and literary criticism is open to doubt. In terms of academic rigour, I agree with Rorty that the belief amongst philosophers such as Gasché and Norris that the tools of deconstruction function in a recognisably philosophical manner in determining the conditions of meaning<sup>106</sup> requires a belief, along with Austin, in a "Right Context" and hence a halt to the play of differences.<sup>107</sup> While Gasché's insistence that Derrida's concepts provide an original insight as to the conditions for linguistic meaning may be credible, it is not difficult to appreciate the worry that *différance* engenders an arena of infinite textuality, and hence an interminable loss of meaning. Derrida's texts 'deconstruct' a great number of western authors with no indication that deconstructability is limited to them.<sup>108</sup>

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<sup>104</sup> Gasché (1979) in McQuillan (2000) *supra*, n.102, p. 131

<sup>105</sup> See Sheriff (1989) *supra*, n.30, p.47

<sup>106</sup> See Gasché, (1986) *supra*, n.8, Chapter Eight: 'Deconstructive Methodology', pp. 121-176, esp. p.124: "...nothing prevents our formalizing to some extent the different theoretical movements that make up *one rigorous notion* of deconstruction." (emphasis added)

<sup>107</sup> Rorty, R. in Mouffe, C. (ed.) *Deconstruction and Pragmatism*, (London: Routledge, 1996) Chapter Four.

<sup>108</sup> Saussure's theory of language as difference, which Derrida adopts, is undeniably general. In defining his target, Derrida uses generalising labels such as "western thought" (Derrida (2002a) *supra*, n.51, p.2), "western science" and "western philosophy" (*ibid*, p.351). His comments on the accident and unlimited context of writing as a law of language in, say, his

Norris might respond by pointing out that this analysis misrepresents and oversimplifies both his attitude and the philosophical implications of deconstruction. The differences between Norris and Rorty on the notions of truth and falsity in interpretation mean that, unlike Rorty, Norris leaves himself the necessary critical space for characterising certain readings of Derrida as *misrepresentations* as opposed to merely *different* representations.<sup>109</sup>

Although Derrida does not withdraw his comment in ‘White Mythology’ that the priority of philosophy over metaphor is a myth, he qualifies it by maintaining that nevertheless, philosophical distinctions are not effaced. Norris takes up this thread in regarding Derrida’s philosophy as not one of ‘either/or’ but rather ‘both/and’. Just as Habermas and Searle misread Derrida’s deconstruction of Austin, so Derrida should not be read as arguing that *either* philosophy is prior to and dominant over metaphor *or* else it is entirely

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engagement with Austin, suggests a general rather than a discreet notion. Norris complains that literary critics have, in effect, usurped these concepts and used them outside of Derrida’s intended purpose. But what lesson are we to draw from deconstruction if it is not that the authors own intentions do not exhaust the meaning of concepts or the limits of ‘proper’ context, since an original, authoritative meaning was always absent anyway?

<sup>109</sup> The difference between Norris and Habermas (and also between Norris and Rorty) lies in the range of possible positions on the philosophy/literature distinction. In their own separate ways, both Habermas and Rorty regard that one must prioritise one or the other. Norris, on the other hand, suggests that this perspective results from Habermas’s and Rorty’s own styles as respectively too serious and too frivolous. There is a third way, says Norris (1990) *supra*, n.7, pp.73-4), which preserves the distinction between philosophy and literature and accommodates both. Norris insists that Derrida’s idea of deconstruction is as a “critical discourse” and hence not a leveller. (Norris (2000) *supra*, n.7, p.73)



irrelevant.<sup>110</sup> This logic is also identifiable in Gasché, who reads White Mythology as an ambiguous “quasitranscendental”.<sup>111</sup>

## 5. Conclusion

‘Philosophical’ criticisms and interpretations of deconstruction suggest that deconstruction as it is conceived by Rorty, Fish and others is deeply problematic in terms of political implications. Deciding whether such comments are

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<sup>110</sup> Derrida recommends a new articulation of metaphor which accounts both for the continuity between philosophy and metaphor (both supplement each other) and also the difference between them in terms of effect in language (Derrida (1982) *supra*, n.53, p.263). As Habermas himself argued (against Derrida), Derrida accepts that the *effect* of scientific and philosophical language is different to poetry and literary criticism. Redefinition can bring scientific progress: through scientific critique of metaphorical expressions, inaccuracies of language can be rectified (*ibid*, p.264). However it must always be borne in mind that this rectification is itself metaphorical and so the process of redefinition is continuous (*ibid*, p. 266-7). Consequently, western thought does not fall; it simply loses its natural self-assurance. The metaphysics and logocentrism that characterises western philosophy cannot be escaped or rejected as such, because there is no language that can do without them (Derrida (2002a) *supra*, n.51, p.354).

<sup>111</sup> Gasché (1986) *supra*, n.8, p. 295. Metaphor as neither straightforwardly philosophical nor literary, although, for Gasché, “Derrida has never left the slightest doubt that metaphor is by nature a metaphysical concept.” (*ibid*, p. 293); The ‘both/and’ logic of deconstruction that Norris refers to is perhaps most easily identifiable in Derrida’s comments on justice, discussed in Chapter Seven. As mentioned briefly above, it is here that we most clearly see the transcendental, metaphysical side of Derrida, which Rorty most detests. In his essay, ‘The Force of Law’, Derrida finds that, rather than a surface of complete freeplay, discourses on justice are guided by the “ethical injunction to infinite responsibility”(Critchely (1999) *supra*, n.78, p.112)

‘correct’ is made problematic by the very nature of deconstruction and its emphasis upon the ambiguity of meaning. To say that one interpretation is ‘better’ than the other suffers from the problem that, what it means for Rorty to make such a value judgment, is different to what it means for Norris. As discussed above, a better interpretation is, for Rorty, simply a different way of poetically describing something for which we happen to have a preference, despite his assertion that modern western liberalism is a superior political culture. For Norris, the judgement is a serious affair involving the mobilisation of traditional concepts of philosophical academic rigour. This chapter has suggested ways in which Derrida’s own writings can be read to support both ‘literary’ and ‘philosophical’ views. In focussing more closely upon the problem of ethical critique, the next chapter will move on from Rorty’s pragmatism in order to examine the Levinasian, transcendental aspects of deconstruction. The chapter will focus primarily on the transcendental metaphors of death and mourning which recent deconstructive writings have referred to in addressing the self/other distinction in western thought generally, and legal language specifically.



## Chapter 7

### **The Otherness of the Dead and the Search for Justice: Antigone, Narcissus and the Sly Fox**

#### **1. Introduction**

It is not only from a liberal perspective that deconstruction is criticised for its troubling implications for the search for justice. Supporters of particular identity ethics have long protested that the destabilising of foundational notions of community and commonality can only be a disempowerment, degradation and humiliation to vulnerable people for whom identification with a common body act as a defence against political and legal injustice. It is important that *as* a human being a prisoner of war can rely upon the support from the human rights provisions of the Geneva Convention. Similarly it is important that *as* a member of a trade union, a worker has a larger structure of support in a dispute with an employer. It is not difficult to appreciate the feeling that deconstructing such identities takes something vitally important in promoting peoples' self-respect and integrity and renders it impotent through linguistic trickery.<sup>1</sup> Indeed, Rorty's 'literary' deconstruction provides nothing more to guide ethical and political judgment other than contingent preference. Just as we might prefer, say, Philip Roth to Salman Rushdie, so we might prefer liberal democracy to Islamic law. It is to this underwhelming conclusion that critical philosophers

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<sup>1</sup> See Hekman, S. J. *Moral Voices, Moral Selves: Carol Gilligan and Feminist Moral Theory* (Cambridge: Polity Press, 1995) p. 140-1

point in complaining that deconstruction is politically lame, superficial and nihilistic. We saw also that the Postmodern abandonment of systematic philosophical theory in favour of a concern for the ‘other’ is criticised for being a manifesto of despair, as it is a concern that constructs a scenario of injustice without end.<sup>2</sup> The injustice inflicted on the singular Other through assimilation to or exclusion from the generalising categories of law is an effect of the very efforts to be just, since all these efforts can only be articulated through the means that cause injustice. The religious fundamentalist set aside by Rawls’s justice as fairness; the hermaphrodite deciding whether to tick M or F on a job application form; the conjoined twins whose lives are not compatible; the asylum seeker whose stories of abuse and terror are not believed because of a lack of recognised verification: these are all ‘others’ in the sense that they resist systematic and logical representation and categorisation.

Although deconstruction resists such reductions of the other, it cannot promise that the injustices it suffers can be overcome. For deconstruction, the only way of being ethical towards the Other is to escape the generalising representations of justice in law, and it is precisely this that deconstruction renders impossible. Requiring a singular response within a system of generalising legal principles, this response is always a moment of undecidability. Necessarily articulated through law’s language of rights and duties, a legal decision is both an attempt to answer to demand and also a betrayal. Responding to Rose’s critique of *Spectres of Marx*, Catherine Kellogg

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<sup>2</sup> See Gillian Rose, *Mourning Becomes the Law: Philosophy and Representation* (Cambridge University Press, 1996). See also Eagleton, T. *The Illusions of Postmodernism* (Oxford: Blackwell, 1996)



argues that whilst undecidability might lead to unending grief, it nonetheless politicises discourse on justice. Attempting to steer a position between Derrida and Rose, Kellogg accepts Derrida's view that the singular (object, event, injustice) is not directly accessible to law: it must be made intelligible to law through representation and hence through a system of exchange. Therefore representation (that Rose conceives as the 'mourning' of the loss of the singular) "may well be necessary for the function of law, [but] not only does it not guarantee justice, it covers over the very moment of political contestation."<sup>3</sup> Hence the commodification of the subject of justice is both the possibility of judgment and the impossibility of justice.

The only approach it leaves open to itself in its ethical preoccupation are the "small scale" tactics of theory: "provincial, open stories", attention to "repressed" and "oppressed dialects and idioms".<sup>4</sup> None of these can wholly grasp the Other and make it fully understood, but they do sustain a constant movement towards the Other and its otherness by imagining new idealities, new utopias and new ways to understand. This chapter will attempt to show how the apparent relativism of poeticising law's rationality can be seen as a first step towards developing an ethics of otherness. The argument developed in this chapter is that the possibilities opened up by deconstruction for fluidity in interpreting the demands of 'justice', allow for a creative orientation towards addressing the binary logic of law as an ethical problem. Through an

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<sup>3</sup> Kellogg, C. 'Mourning Terminable and Interminable: Deconstruction, Law, Representation'

Paper prepared for the Study of Law, Culture and the Humanities, Benjamin N. Cardozo

School of Law and New York University, New York NY, March 7-9 2003 p.10

<sup>4</sup> Douzinas, C. & Warrington, R. with McVeigh, S. *Postmodern Jurisprudence: The Law of the Text in the Texts of the Law* (London: Routledge, 1991) Introduction, p. x

examination of differing deployments of loss and mourning as transcendental metaphors, this chapter argues that, although Rose is correct to regard deconstruction as an interminable mourning of the lost experience of the singular instance of justice, this state of affairs is not without positive significance for legal scholarship. For writers such as Derrida, Goodrich, Levinas and Douzinas, whose theoretical perspectives we shall begin by briefly rehearsing below, this insight is expressed by metaphors of death and mourning. Otherness is represented by that which is lost, mourning the unending process by which the mourner attempts to regain it. I situate my own viewpoint through an interpretation of the stories of ‘Echo and Narcissus’<sup>5</sup> and also ‘The Sly Fox and the Little Red Hen’.<sup>6</sup> Through a reading of these texts, an attempt is made to assert the ethical significance of conceiving the relationship between Self and Other as undecidable. The difficulty in approaching ethics deconstructively is the precise nature of the other’s ‘otherness’. Despite accepting the Levinasian notion of the Other as absolutely unique and irreducible, I argue that this uniqueness should not be understood as engendering two distinct spheres of ‘law’ and ‘ethics’.

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<sup>5</sup> Of the many accounts of the myth told by Ovid, quotations are drawn from two English translations: Ovid, *Metamorphoses*, Innes, M. M. (trans.) (London: Penguin Classics, 1955); also Hughes, T. *Tales From Ovid: Twenty Four Passages From The Metamorphoses* (London: Faber and Faber, 1997)

<sup>6</sup> Traditional, retold by Southgate, V. *The Sly Fox and the Little Red Hen*, Ladybird Books, 1973)



## 2. Goodrich and Derrida: The Ethics of Mourning and The Gift of Death

Deconstructive perspectives on ethics compare the inadequacies of linguistic representation of ‘justice’ to the physical limitations of and attitudes involved in the act of mourning a lost loved one. Derrida’s idea of ‘true’ mourning is that which remembers that the lost one – the Other – cannot be entirely appropriated for the comfort of the mourner – the Self – but is an infinite variety of memories, moments, stories, etc. in the minds of different people. ‘Selfish’ mourning, on the other hand, is an unethical attitude in which the dead one is remembered as identical to the mourner’s own memories and impressions. Goodrich demonstrates his position on the idea of mourning as an ethical relationship between Self and Other through his metaphor of the widow and the broken mirror. Taking as his reference an Eighteenth Century manual of conduct, Goodrich imagines the relationship between law and its history as a widow who mourns the loss of her husband. Being forever lost to her in person, she recalls his memory to herself, and “as in a broken mirror the refraction multiplies the images...”.<sup>7</sup> Rather than trying to actually bring the dead person back again, his image is recalled and repeated in many different ways. For Goodrich this is a convenient medium for challenging the hegemony of law’s interpretation of its own history. The western philosophical approach to an ethical decision takes the position of Kantian morality: that which is right is that which can be assimilated to an ideal set of values. But the origins of the law are

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<sup>7</sup> Allestree, R. *The Ladies Calling* (London: n.p., 1677) p.69, quoted in Goodrich. P. *Oedipus Lex: History, Psychoanalysis, History, Law* (Berkeley, C.A. & London: University of California Press, 1995) p.16

lost forever – we can never completely bring them back. Instead they are endlessly repeated to us, refracted in the cracked mirror of interpretation in “innumerable”<sup>8</sup> common-law cases. In this sense we see how Goodrich approaches the problem of presence and absence in ethics: there is “play” between the present and past in that neither history nor the contemporary are wholly present or absent in terms of the certainty of the narrative being constructed.<sup>9</sup> This ‘play’ is effected through the operation of simulation and representation for the mourner/law maker. The absence (otherness) of the past is made present through imaginings and memories. The presence of the mourner’s identity is bound up with absence because it is composed of representations of the past. The mourner cannot be separated from this absence because it provides her with a connection to her roots.<sup>10</sup> To insist that one particular representation of the past is correct or sufficient is to preclude the possibility of ethics which, in this conception, requires freedom to reinterpret the past in other ways. Of course, this could be read as the kind of freedom that critics such as Eagleton dismiss as merely the ‘freedom’ to be dragged into a hopeless, aimless world in which everything is ‘interpretation’ and all principles are up for grabs. The

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<sup>8</sup> Goodrich, *ibid.*, p.22

<sup>9</sup> *Ibid.* p.24

<sup>10</sup> Goodrich argues that as an evolving chain of precedent and supplement, the common law gains its identity in the same way. Only through a constant interpretation and reinterpretation of its lost past do we see law’s genealogy (*ibid.* p.25). For Goodrich, then, the law is an endless collection of masks – behind which are an endless number of possible memories, interpretations, histories, which could be recalled and brought to presence through representation. There appears to be a process of unmasking in conceiving law in this fashion – an unmasking of the otherwise assumed full presence and thus natural priority of the present.



problem with Goodrich's account is that there is a temptation to read it as merely a description of what judges cannot help but do anyway. On this view, the metaphor of the widow and the mirror does not allow for any greater insight as to the relationship between law's past and its present than, say, Dworkin's notion of judicial 'integrity' in aligning past cases with present.<sup>11</sup> Fish argues that since the judges have to interpret present cases with decided ones, Dworkin's suggestion that they ought to do this is somewhat redundant.<sup>12</sup> If there is a value in Goodrich's metaphors (as I believe there is), then it is more likely to lie in the conceptualising of a symbiotic relationship between self and other, rather than in direct critique of legal judgment.

The play of presence and absence as a relationship between the contemporary and history is not difficult to identify in legal judgment. In considering the interpretive labour of applying a legal principle in a case, we can only be certain that, as living foundations of the present judgment, such a principle can only be recalled through representation of its origins. As in mourning, they are thus made present for us in order that we can form what we can with some confidence regard as a principle suitable for our needs. It is in the recalling to presence of the various sources of the principle that we find the possibility of approaching the problem ethically.<sup>13</sup> Although there is no direct access to the

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<sup>11</sup> See Dworkin, R. *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986)

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<sup>12</sup> See Fish, S. *Doing What Comes Naturally: Change Rhetoric and the Practice of Literary and Legal Studies* (Durham, N.C. and London: Duke University Press, 1989) Chapter: 'Still Wrong After All These Years' pp.356 – 71 especially p.361

<sup>13</sup> Consider, for example, the various narratives that might be drawn upon as sources for the modern conception of the individual. The Judeo-Christian idea of the human being as the

singular Other, its reconstruction in mourning leaves open the constant possibility that the Other can exert an influence on, and even be partly constitutive of, the Self. The implication of the eternal absence of the Other would be nihilism: ethics as always banished from the realm of law. It appears that what Goodrich's metaphor of mourning gives to us as legal theorists, is not a set of tools for critiquing particular legal judgments themselves, but a reminder that the possibility of reinterpretation remains indefinitely open. Reinterpretation in this case means the particular image or story that is constructed in recalling the origins of the principles determining the criteria of judgment. As Rorty and others have argued, we are asked to accept that the possibilities for difference and divergence in this task are endless. The broken mirror of legal history and legal interpretation refracts without end, rendering infinitely many images.

Turning our angle very slightly allows us to glimpse the ethical significance of Derrida's own use of the metaphor of death. For Goodrich, the unethical is the attempt to dominate the memory of origin;<sup>14</sup> for Derrida, it is the thought that one can overcome death, either one's own or another's. 'Death' is a sacred gift from some mysterious, unknowable source, given to each of us uniquely and gives to us our own uniqueness. As such, the source of the gift is the source of the ethical. My death is unique to me: it cannot be taken away or substituted. In my death I see my very subjectivity as unique and hence my own

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image of God and Enlightenment notions such as the individual as an empty slate (Locke) are examples. Obviously, such a vast range of sources require a great deal more attention than there is room for here.

<sup>14</sup> Goodrich (1995) *supra*, n.7, p.13, p.28



otherness.<sup>15</sup> One cannot die ‘for’ someone else or bring them back to life through mourning. These are simply attempts to deny (impossibly) the other’s uniqueness.<sup>16</sup> For Derrida, the metaphor of death as a mysterious gift signifies, not only the uniqueness of each other,<sup>17</sup> but also that at the heart of ethical judgment lies a secret, or mystery. We are confronted with an imperative to take responsibility for the Other, and the source of this imperative is itself other to all our attempts to understand it. No matter how much we ‘rage against the dying of the light’, we cannot escape from taking responsibility for our own particular death. Thus death is the source of an ultimate responsibility: given to each of us as a gift that cannot be refused. However, since we cannot say where this responsibility comes, our efforts to be responsible in making judgments must similarly contend with a mystery of origins.

“...every revolution, whether aesthetic or religious, bears witness to a return of the sacred in the form of an enthusiasm or fervour, otherwise known as the presence of the gods within us.”<sup>18</sup>

It is possible to regard Derrida’s quasi-theological ethics as rather imperious. Although the secret gift of death confers singular responsibility, the singular Other for whom we must take responsibility can never be grasped, since all

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<sup>15</sup> Derrida, J. *The Gift of Death*, David Willis (trans.) (Chicago and London: University of Chicago Press, 1996) p.41

<sup>16</sup> *Ibid.*, p.43

<sup>17</sup> “Every other (one) is every (bit) other”, *ibid.* p. 82

<sup>18</sup> *ibid.* p.21

attempts to address it are mediated through the limitations of law. Law's inadequacy is, for Derrida, so severe that its representations of justice are no more than a profanation of the sacred singularity of the Other. Derrida warns of catastrophic consequences for humankind of such profanation.<sup>19</sup> In our attempts to pin down the sacred and absolutely Other in our political language, we are plunged into an abyss, which obscures the impending disaster that such impudence brings upon ourselves. Derrida argues: "The abyss does not, any more than language, let itself be dominated, tamed, instrumentalised, secularised."<sup>20</sup> For Derrida, the idea is that being 'responsible' always also involves 'irresponsibility' inasmuch as it necessarily involves a certain lack of knowledge – for instance a core value that we do not fully grasp. In attempting to universally thematise our responsibility we betray the otherness – or secrecy – of the other. Alain Badiou, whose work on ethics challenges what he regards as Derrida's orthodoxy of otherness, contends that the realm of the singular is not impossible, but rather universally available through revolt against the general situation of the state.<sup>21</sup> Levinas, whose work we shall return to in more depth later, expresses the impossibility of responsibility fully banishing irresponsibility thus: "In doing what I willed to do, I did a thousand and one things I hadn't willed to do. The act was not pure, I left traces."<sup>22</sup> That the traces

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<sup>19</sup> Derrida, J. "The Eyes of Language" in Derrida, J. *Acts of Religion* (New York, N.Y. and London: Routledge, 2002) pp.189-227 at 194, 196

<sup>20</sup> *Ibid.*, p. 198

<sup>21</sup> Badiou, A. *Ethics: An Essay on the Understanding of Evil*, Peter Hallward (trans.) (Verso: London; New York, 2001) Translator's introduction, pp.xxvi-xxvii

<sup>22</sup> Levinas, E. *Entre Nous: Essays on Thinking of The Other*, trans. Michael B. Smith and Barbara Harshav (London: Athlone Press, 1998) p.3



of accident and the unforeseen are carried with what is intended, signifies for Levinas a wholesale reversal of the other's subordination to Self, or Being. Like Derrida, Levinas tries to show that it is not knowledge, but sacred responsibility that grounds ethics. The Other can never be fully thematised or understood. Each Other is infinitely different, unique and impossible to assimilate to a set of general laws and principles.

We can find links of sorts between the ways that Derrida and Goodrich invoke metaphors of death and mourning here. For Goodrich the possibility of mourning as through a broken mirror is the possibility of an ethics of historical interpretation in law. For Derrida it is the inevitability of death itself and the physical limitations of mourning that remind us of our ethical responsibility toward the Other. In these metaphors, we see the present order of things as a collection of metaphors for representing and reconstructing our lost histories and origins. The former character and personality of a dead person can never be wholly assimilated to the memories of a mourner, since the original object of the memories is lost upon that person's death. For Cornell, recognition of the necessary failure of mourning to actually bring a loved one back to life is the opening of the possibility of an ethics that does not reduce the Other to the identity of the Self.<sup>23</sup>

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<sup>23</sup> Cornell, D. *The Philosophy of the Limit* (New York, N.Y. & London: Routledge, 1992) p.73;

See also Derrida (1996) *supra*, n.15, pp.44-5

### 3. The Tragedy of *Antigone* Revisited: Mourning Without End, But Not Without Purpose

Sophocles's *Antigone* has long been a source of fascination for theoretical perspectives on the relationship between conflicting authorities of duty.<sup>24</sup> This chapter's addition to the existing literature is motivated by what I regard as Douzinas's flawed (though admittedly influential) reading of the play. Douzinas conceives the Other in much the same way as we have discussed above – unique, non-essentialisable, demanding justice without being assimilated to law's common language.<sup>25</sup> However, his reading of *Antigone* actually undermines the utopian, hopeful aspect of his postmodernism, which in a later polemic he declares is “the greatest contribution of our political culture to the new millennium”.<sup>26</sup>

Douzinas focuses upon what he regards as the “diametrically opposed perspectives”<sup>27</sup> and motivation between the central characters of Antigone,

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<sup>24</sup> See Hegel, G.W.F. *Lectures on the Philosophy of Religion*, Hodgson (trans.) (Berkeley C.A.: University of California Press, 1988); Bernasconi, R. ‘Persons and Masks: The Phenomenology of Spirit and its Laws’ in Cornell, Rosenfeld and Carlson (eds) *Hegel and Legal Theory* (London, New York: Routledge, 1991); Posner, R. *Law and Literature* (Cambridge, Mass.: Harvard University Press, 1988); Segal, C. *Tragedy and Civilization: An interpretation of Sophocles* (Cambridge, Mass.: Harvard University Press, 1981); Weinreb, L. *Natural Law and Justice* (Cambridge, Mass.: Harvard University Press, 1987)

<sup>25</sup> Douzinas, C. and Warrington, R. *Justice Miscarried: Ethics, Aesthetics and the Law* (London and New York: Harvester Wheatsheaf, 1994) p. 20-1

<sup>26</sup> Douzinas *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, (Oxford: Hart Publishing, 2000) p.342

<sup>27</sup> Douzinas and Warrington (1994) *supra*, n.25, p.30



daughter of Oedipus and her uncle, King Creon of Thebes. At the beginning of the play, we learn that Antigone's brothers, Polynices and Eteocles, have recently died fighting one another in the War of Thebes. The new king, Creon, has decreed that, since Polynices was a traitor to the city, it is strictly forbidden to give him the honour of a burial. However, through loyalty to her brother, Antigone defies the decree and allows herself to be arrested. King Creon applies the law by insisting upon her execution despite being advised that this would be unjust and will lead to his own downfall. For Douzinas, Creon represents all that is wrong with law as such: its cold, public universalism and its basis in rules rather than justice. Conversely, Antigone represents the opposite: an ethics based on a tie of unique, singular, passionate love<sup>28</sup> and femininity.<sup>29</sup> On Douzinas's reading, *Antigone* is thus the story of the forces of reason and legality attempting to crush that singular love-tie which gains its imperatives from higher sources, outside the sphere of law.<sup>30</sup> As Badiou might say, Antigone's defiance is an 'event': a personal fidelity to a cause which sets the subject apart from the ordinary sphere of the moral hierarchies engendered by the state, and orients her towards the exceptional realm of singular, irreplaceable and innovative truths.<sup>31</sup> The two characters represent irreconcilably different measures of what is right. From his rule-orientated position, Creon regards Antigone as mad.<sup>32</sup> Antigone's explanation of herself – "My way is to share my

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<sup>28</sup> *Ibid.*, p.36-7

<sup>29</sup> *Ibid.*, p.78

<sup>30</sup> *Ibid.*, p.61

<sup>31</sup> Badiou (2001) *supra*, n.21, Translator's Introduction pp. viii-xi

<sup>32</sup> 'Antigone' in Sophocles, *The Theban Plays*, Watling, E.F. (trans.) (Harmondsworth:

Penguin Classics, 1974): Referring to Antigone and her sister Ismene who defends her, Creon

love, not share my hate”<sup>33</sup> – cannot be understood by Creon, who believes that loyal subjects and traitors must be distinguished. It does not make sense to him to offer the same dignity in death to both loyal subjects and traitors.<sup>34</sup> Douzinas’s argument is that the Other exerts an ethical force which is separate from mere legality. On this reading, Creon’s own downfall results from his inability to deal with “the laws of those forces that do not follow his rationalism”.<sup>35</sup> I want to argue that Douzinas is wrong to interpret the play in terms of a clash between the laws of man and its other. Creon’s decree is not defended on the basis of positive law and Antigone’s defiance and perspective on justice is not a defiance of man-made law as such.

What insight can be drawn from Douzinas’s reading of *Antigone*? Douzinas wants to show that where-as ‘law’ may be able to give us the possibility of a blandly tolerable state of affairs, justice is something unique to each case. Law deals only with the general and in doing so commits violence against the singular, particular cases that cannot be so easily generalised. Ethics is a concern for the otherness of such singularities. It is the heeding of the call of the other: making oneself vulnerable to injury or even death for the other, as Antigone does for her brother. This means that ethics is itself ‘other’ to law, since it recognises no consolidation, codification or precedent. However, we must be clear as to what we want a deconstruction of Self and Other to achieve. There is a danger that, in emphasising the irreconcilability of the perspectives of

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declares at p. 141: “I do believe the creatures both are mad/One lately crazed, the other from her birth.”

<sup>33</sup> *Ibid.*, p.140; quoted in Douzinas p.74 as “I was borne not to hate, but to love.”

<sup>34</sup> *Ibid.*, “Creon: Do we owe honour to the dead even if they are traitors?”

<sup>35</sup> Douzinas and Warrington (1994) *supra*, n.25, p. 38



King Creon and Antigone, we are drawn towards a position from which it is difficult to make a positive contribution to the problem of ethics. Douzinas presents a monochrome choice between a system of cold, heartless legal rules and a glimmering, lovely, feminine ethical imperative. Douzinas's comments that this ethical imperative has no definable body, shape or rules simply reiterates the complete exteriority of the Other. This would suit the likes of King Creon very well, who would banish all forms of 'madness' from the realm of rational, universalist law. On this view, ethics is an Other that is not only dead, but vaporised. To mourn its loss would not only be interminable, it would also be pointless, since law and ethics are so radically divorced.

In a sense that is reminiscent of a Kantian moral contradiction, Antigone's actions seem particularly problematic because she feels compelled to act directly against the authority of the State, obedience to which King Creon regards as crucial.<sup>36</sup> However, the binary opposition between law and ethics is not the only way of reading *Antigone*. Much of the text of the play is concerned with various characters justifying their respective positions on the dispute over whether Antigone should be executed under Creon's decree. What becomes clear from these speeches is that the dispute is not so much about the clash between positive laws of the city and particular ethics, but between the personalities and wills of the opposing protagonists. Despite his rhetoric of legality, Creon is not interested so much in ensuring the law's supremacy, but in the supremacy of his own will. Creon says to his son, Haemon: "...I hold to the law/ And will never betray it – least of all for a woman. /Better to be beaten by a

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<sup>36</sup> Sophocles (1974) *supra*, n.32, p. 144: Creon: "He whom the state appoints must be obeyed to the smallest matter, be it right – or wrong."

man, if need be/ Than let a woman get the better of us.”<sup>37</sup> And later, “[Creon]: I am king, and responsible *only to myself*./ [Haemon]: A one-man state? What sort of state is that?”<sup>38</sup> There is a fine line to be observed here. If Creon is indeed the supreme ruler of Thebes he is clearly acting within the bounds of positive law to enforce his decree. In that case Antigone’s defiance would indeed be, as Douzinas claims, a defiance of the law.<sup>39</sup> However I would contend that these passages show that it is Creon’s own chauvinistic pride that drives him to execute Antigone, and that the law is merely his alibi and his attempt to evade responsibility for doing what he knows to be unpopular. The dispute between Creon and Haemon as to the relationship between king and state indicates that Creon’s view of his duty is not a simple reflection of prevailing legal norms. Hence the clash between Antigone and Creon is not one between law and love, but between singular human wills, each of which calls its own legal foundation as counsel. In her defence, Antigone says to Creon: “I did not think *your* edicts strong enough/To overrule the unwritten and unalterable laws”.<sup>40</sup> That on a positivist analysis Creon’s edicts constitute the law does not prove that Antigone intends to defy man-made law in favour of the laws of ‘the gods’, but rather that she refuses to recognise the dictates of an idiosyncratic ruler. In the final scene, when Creon realises that his stubbornness has brought disaster upon himself, he abandons his line that the law must be applied: “Twas *I* imprisoned her/ And *I* will set her free.”<sup>41</sup> However, it is too late. Antigone has

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, p.146 emphasis added

<sup>39</sup> Douzinas and Warrington (1994) *supra*, n.25, p.39

<sup>40</sup> Sophocles (1974) *supra*, n.32, p.138 emphasis added

<sup>41</sup> *Ibid.*, p. 156 emphasis added



taken her own life, and Haemon, who was betrothed to marry Antigone, subsequently does likewise. Upon hearing of Haemon's death, his mother Eurydice (Creon's wife), kills herself also. Heartbroken, Creon takes personal responsibility for the tragedy, and no more is said regarding the lawfulness of his actions: "It is true, *I* killed him."<sup>42</sup> The judgments of two other characters emphasise the personal nature of the dispute. Teiresias, a highly respected old prophet had criticised Creon for his decision regarding Antigone and had warned him that "only a fool is governed by self-will".<sup>43</sup> The Messenger, whose unfortunate duty it is to tell Eurydice about Haemon's death adds: "How great calamity can come to man/Through man's perversity".

My disagreement with Douzinas finds partial alliance in Gillian Rose. For Rose, ethics is inconceivable without the possibility of reconciliation between the singular and the law. For there to be hope for a more just future, Rose insists that we cannot afford to suppose that the injustices of law are institutional or permanent. Referring to a painting by Poussin,<sup>44</sup> in which a young woman stoops to collect the unburied ashes of her wrongly executed husband for a secret, prohibited burial against a backdrop of the imposing architecture of Athens, Rose rejects the interpretation that the scene represents discreet love defying the institutional injustice of law.<sup>45</sup> It is important for Rose that the injustice of the husband's execution is a *specific* instance of injustice: a temporary departure from the norm, as opposed to the norm itself. It is a

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<sup>42</sup> *Ibid.*, p.161 Referring to Haemon. Emphasis added

<sup>43</sup> *Ibid.*, p.153

<sup>44</sup> 'Landscape with the Ashes of Phocion' (1648)

<sup>45</sup> Rose (1996) *supra*, n.2, p.25; Rose attributes this interpretation to the television art critic

temporary divorce between law and justice, which is healed through mourning. For Rose, mourning allows reconciliation between soul and city, ethics and law: not to mourn is to accept the divorce between these notions. In mourning her husband, the widow in Poussin's painting gives presence to a temporarily lost idea of justice – and through this work of mourning is reunited with the city.<sup>46</sup> I would suggest that what my reading of *Antigone* indicates is neither Douzinas's radical divorce, nor Rose's happy reunion, but rather a movement towards ethics: mourning without end, but not without purpose. On Douzinas's reading, there is no such movement. His relation between ethics and law is as static as it is distant.

If Douzinas wants to define 'ethics' as that which directly contradicts the moral hierarchy of 'law', he effectively rules out the political and ethical 'work' of mourning that Rose refers to. For, if these are truly irreconcilable with general legal principles, how could the law even begin to comprehend or care what ethical questions arise? Surely banishment and execution is all that those who demand such an ethic can expect. This reading of *Antigone* gives no account of dilemma, except that we can choose to be hard-hearted like King Creon and apply the law straightforwardly, or else we can be loving and caring like Antigone and heed the call of the other.<sup>47</sup> In his earlier *Postmodern Jurisprudence* Douzinas maintains this binary argument. "Typical"

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<sup>46</sup> *Ibid.*, p.26

<sup>47</sup> In this respect Douzinas finds himself an unlikely bedfellow in George W Bush: "Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. (Applause.)" Address to a Joint Session of Congress and the American People, September 20 2001, Washington D.C.

(<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>)



jurisprudence, it seems, is “rooted in the metaphysics of truth rather than the politics and ethics of justice” and is thus deconstructable.<sup>48</sup> It is difficult to avoid reading Douzinas as attempting anything more or less than the kind of crude reversal of hierarchy for which Postmodernism more generally is denigrated by critics such as Eagleton.<sup>49</sup>

#### 4. Levinas: The Face of the Other

Levinas’s take on the Self/Other problem is that ‘ethics’ and ‘responsibility’ go *beyond* the representations of law, which relies on identification of essence to draw a totalising area of moral concern. Ethics is beyond this systematisation, argues Levinas, in the same way that the unique expressive and contour details of a person’s face are beyond systematisation. It is therefore only by sense – physical proximity to that face – and not theoretical conceptualisation that we can see the Other’s uniqueness and address them ethically.<sup>50</sup> At this basic level, Levinas might be interpreted as addressing our problem of logical exclusion in a way that is recognisable in Derrida and Goodrich: that the identity and demands of the Other exceed the capabilities of law’s logic of identity and difference. Indeed, Levinas does give some cause for such a reading. For instance, Levinas states that the Face “is a trace of itself” – i.e. it makes its demands without

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<sup>48</sup> Douzinas and Warrington with McVeigh (1991) *supra*, n.4, p.27

<sup>49</sup> See chapter six.

<sup>50</sup> Levinas, E. *Otherwise Than Being or Beyond Essence*, Lingis, A. (trans.) (The Hague & London: Nijhoff, 1981) p.11, p.16

reference to presence or absence, which would suggest that the unique makes itself visible and impossible to ignore in all forms of judgment and action.

However, Levinas's project is more ambitious than pointing out a tension between the general and unique in judgment. His position might be read as more like that of Douzinas and Warrington in that he wants to entirely overturn the prioritisation of Self (or Being) over the excluded Other. Levinas's argument is that 'ethics' is not an indeterminate play between Self (presence) and Other (absence), but an encounter with the irreducible Other which is prior to Self, and hence prior to shared identity. There is an "absolute separation" between self and other.<sup>51</sup> In fleshing out his metaphor of the physical encounter with the Other, Levinas makes this aim explicit through a rhetoric of vulnerability and violence. In a move that radically separates him from, say, the liberal theorists examined in Chapters One and Two, Levinas denies every possibility that ethical responsibility finds its motivation in any shared identity. All equivalence and mutuality is deemed secondary to the unpredictable, often frightening or painful experience of alterity. When I meet the other, I cannot know anything about him at all except that he is a "neighbour" or a "brother":<sup>52</sup> "the persecuted one for whom I am responsible to the point of being a hostage for him".<sup>53</sup> The language of neighbourliness and brotherhood are not supposed to suggest that I recognise the claims of others because I recognise traits of myself in them. "I hardly care what the other is with respect to me, that is his

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<sup>51</sup> Levinas (1998) *supra*, n.22, p. 185

<sup>52</sup> Levinas (1981) *supra*, n.50, p.87

<sup>53</sup> *Ibid.*, p.59



own business; for me, he is above all the one I am responsible for.”<sup>54</sup> There is no common humanity as such to fall back upon for Levinas, since this would imply the primacy of self and a reduction of the Other to my own understanding.<sup>55</sup> In taking ethical responsibility for the Other I should not expect to gain anything in return, and should be ready to suffer injury and pain.<sup>56</sup> In the absence of all unifying narratives (Levinas rules them all out) the only basis on which I am supposed to take responsibility for the Other is that I cannot resist their call.<sup>57</sup> Furthermore, this ‘call’ is itself not necessarily a communicative act in any definable sense. In breaking down the unifying elements of shared discourse, Levinas’s metaphor of the face is a prioritisation of the role of sensibility and touch as an ethical ‘language’.<sup>58</sup>

“Moral consciousness” is impossible, argues Levinas, prior to the experience of alterity.<sup>59</sup> But why should I heed the call of one with whom I share nothing and have no understanding or knowledge of? How can this other’s voice make such a strong claim on my conscience? Cornell points out that, in naming the Other as absolute infinity, Levinas risks appropriating it to a totalising system of knowledge and doing the same violence for which he

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<sup>54</sup> Levinas (1998) *supra*, n.22, p.105

<sup>55</sup> *Ibid.*, p.15

<sup>56</sup> Levinas (1981) *supra*, n.50, p.50, p.57, p.63

<sup>57</sup> Levinas (1998) *supra*, n.22, p.187; also Levinas *Ibid.* p.12

<sup>58</sup> Critchley, S. *The Ethics of Deconstruction* (Oxford and Cambridge, Mass.: Blackwell, 1992) pp.179-80

<sup>59</sup> Levinas (1998) *supra*, n.22, p.17

criticises western philosophy.<sup>60</sup> If the Other is unknowable, then how can Levinas be qualified to write so much about it? This is a serious logical contradiction in Levinas's work. By writing about ethics at all, he is surely attempting to name that which he is also insisting is unnameable. Thus his own scepticism threatens to invalidate itself. In order to escape this contradiction, Levinas distinguishes two types of discourse: a past-tense discourse of the "Said" and a present-tense discourse of "Saying".<sup>61</sup> The Said is all that is named and systemised. If Self is understood as a signifier of determinable identity then the Said can be regarded as corresponding to this part of the Self/Other binary pair. The Said thus encompasses the realm of identity ethics, that is, ethical perspectives premised upon a shared identity or set of moral characteristics. The Saying, on the other hand, refers to that which escapes simple identification in language. It is all that is other to our definitions and categorisations, and as suggested by its present tense form, the Saying is that which is infinitely unfinished.<sup>62</sup> Being always something other to attempts to identify it, the Other occupies the realm of the Saying and the Said is always an injustice to it. Levinas's argument would suggest that 'ethics', being, like the human face, always more than our attempts to define it, is part of this unfinished discourse. But even to say this much amounts to an attempt to rationalise it, and therein arises the apparent contradiction in Levinas. This could be regarded, not simply as logical contradiction, but as an example of the fraught relationship between

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<sup>60</sup> Cornell, D. *The Philosophy of the Limit* (New York, N.Y. and London: Routledge, 1992a)

p.69

<sup>61</sup> Levinas (1981), *supra*, n.50, p.46

<sup>62</sup> *Ibid.*, p.47



deconstruction and ethics more generally. Levinas does not provide any easy answer as to how we can be ethical when any attempt to articulate the ethical involves betraying it. Ethical discourse therefore must comprise of a series of interruptions of the Said by the Saying. As Critchley observes, this is the structure of *Otherwise than Being*: the ethical relation is articulated, then interrupted by doubts, then returned to and re-articulated.<sup>63</sup> Ethics is the infinite interruption of the Said, and hence, infinite responsibility towards the other.

This notion of infinite responsibility allows Levinas to survive the contradiction of his scepticism, and here he finds common ground with Derrida and Cornell. In its infinite difference, the Other always escapes systematisation, even by Levinas. The only assistance that Levinas can give in the effort to be ethical is an unending juxtaposition between responsibility and betrayal, and between language (Said) and the Other (Saying).<sup>64</sup> By the logic of infinity, the demands of the Other are unquenchable: they can never be met because we can never know exactly what they are or even who the Other is. Respecting the infinite uniqueness of the Other means accepting the fact that our responsibility towards them can never be fulfilled.<sup>65</sup> Cornell argues that the limited capabilities of language indicates that it is a mistake to think that logocentrism, self and Being can be entirely escaped. The value of Levinas's work is as a constant reminder that representational schemes always inflict violence upon the other. In the limits of language we run up against the limit of

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<sup>63</sup> Critchley (1992) *supra*, n.58, p.229

<sup>64</sup> *Ibid.*, p.165

<sup>65</sup> *Ibid.*, p.99; With Derrida, Cornell argues that the very nature of our language and the limits it necessarily involves saying anything means that it is a mistake to think that logocentrism, self and Being can be entirely escaped.

philosophy, which, instead of condemning us to silence, “challenges us to re-open the question – to think again.”<sup>66</sup>

The limitations of Levinas’s uncompromisingly radical position are made clear when one examines his attempts to conceive the singular ethical relationship in the context of the ‘real world’, inhabited by third parties. Levinas admits that the general experience of the world is not of a single relationship of oneself to one other, but of many different relationships, all of which demand attention in their own unique way. When Levinas considers the ethical relationship in this context, the hitherto absolute impossibility of generalising the Other is softened to a tolerable, necessary systematising violence, but still founded in the non-violence of the unique face. Since a legal system is required to make systematic generalisations, there arises the ubiquitous threat of violence. However, the ethic of the face of the Other remains primary, and this ensures that there is a limit to the violence of such generalisations. This gives violence a legitimate place in Levinas’s idea of the state. “There is a certain measure of violence necessary in terms of justice... one cannot say that there is no legitimate violence”.<sup>67</sup> The demands of third parties necessitate “a certain abandonment of the absolute allegiance” to the Other.<sup>68</sup> Levinas even goes on to assert that the ethics of alterity “preserves the ethics” of a liberal state.<sup>69</sup> Following his condemnation of systematic identity-based conceptions of justice for the violence that they inflict upon the Other, Levinas’s apparent alignment

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<sup>66</sup> *Ibid.*, p.71

<sup>67</sup> Levinas (1998) *supra*, n.22, p.105-6

<sup>68</sup> *Ibid.*, p.203

<sup>69</sup> *Ibid.*, p.195



with liberalism comes as something of a surprise. But Critchley reads this, not as a u-turn in defeat, but as a “doubling of discourse”<sup>70</sup> – that the “I-Thou” of ethics entails both a face-to-face and a relation with all.<sup>71</sup> Justice shows its origins in the ethic of the face by its constant revision and hope for a ‘better’ justice.<sup>72</sup> Law’s constant and never-ending search for legitimacy is its inability to free itself of its origin in the uniqueness of each other.<sup>73</sup> Indeed, it should be remembered that politics and justice require first the call of the Other.<sup>74</sup> An ethical critique of a political system involves identifying ways in which existing laws and institutions attempt to assimilate and exclude the Other.<sup>75</sup> The constant revisionism envisioned by Levinas’s ethical politics is what, for Douzinas, stimulates concern for those abused in far away places, “concretised” as a “moral feeling of duty to alleviate the pain of suffering others”.<sup>76</sup> Like Critchely, Douzinas’s later writings stress the simultaneous impossibility and undeniability of the duty, making ethics the “internal exile” of law.<sup>77</sup> Violence abounds in the form of the comparisons and generalisations that law must make but remembering that ethical regard derives primarily from experience of the

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<sup>70</sup> Critchley (1992) *supra*, n.58, p.227

<sup>71</sup> *Ibid.*, p.226; Levinas, E. *Totality and Infinity: An Essay on Exteriority*, Lingis, A. (trans.) (London: Kluwer, 1969) p. 213; Douzinas (2000) *supra*, n.26, also refers to the “double discourse” of the unique and the general relationships at p. 356

<sup>72</sup> Levinas (1998) *supra*, n.22, p.196

<sup>73</sup> *id.* p.203; See also Douzinas (2000) *supra*, n.26, pp. 368-9

<sup>74</sup> Critchely (1992) *supra*, n.58, p. 225

<sup>75</sup> *Ibid.*, p.221

<sup>76</sup> Douzinas (2000) *supra*, n. 26. p. 354

<sup>77</sup> *Ibid.*, p.351

unique is what limits this violence. In the unceasing reconstruction of representations in law the trace of the unique call of the other is glimpsed, jolting the self-satisfaction of rational law's "banal" logic.<sup>78</sup> Cornell explains that, for Levinas, even although "the Good is precisely what eludes our full knowledge", nevertheless we "can also not escape our responsibility" in continually elaborating new principles of justice.<sup>79</sup> For Derrida, similarly, 'justice' is that which is always "to come", always requiring calculation and re-calculation in law.<sup>80</sup> There can be no rest in trying to understand where the Other is speaking from – to do so would be an abdication of responsibility towards the other. Responsibility, as well as being rooted in mystery and irresponsibility in requiring action without the possibility of full knowledge, is "without limits" since we cannot draw a limit to the identity of the other.<sup>81</sup>

It is the notion of otherness as always beyond a particular representation of it that compels us to strive to be ethical. It is this fact that otherness is always something 'beyond' our conceptualisations of it that means that we can speak only about 'striving' and not actually 'being' ethical. For Derrida and Levinas, otherness is expressed as something always mysterious, secret, infinite, even

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<sup>78</sup> Levinas (1998) *supra*, n.22, p.193

<sup>79</sup> Cornell (1992a) *supra*, n.60, p.100; see also Critchley (1992) *supra*, n.58, p.234: In insisting that conceptions of justice must be guided by the responsibility towards the other, Levinas redefines philosophy as the "wisdom of love" (see Levinas (1981) *supra*, n.50, p.161)

<sup>80</sup> Derrida, J. 'Force of Law: The Mystical Foundations of Authority' in Cornell, D. *Deconstruction and the Possibility of Justice* (New York, N.Y. & London: Routledge, 1992) chapter 1, pp.3 - 67 at 27; a revised edition of this essay appears in Derrida (2002) *supra*, n.19, pp.228-298 at 257

<sup>81</sup> *Ibid.*, p.19



sacred.<sup>82</sup> Levinas describes this as “God” – the infinitely other, the trace of whom we experience in encountering another person in the world as a unique other.<sup>83</sup> Common to these conceptions is the idea that we are compelled to be ethical because, in being a necessary leftover from the logic of western thought, the Other always surpasses our expectations. Derrida’s reading, via Kierkegaard, of the Old Testament story of Abraham and his son Isaac on Mount Moriah gives some indication of the source of the ethical in the unknowable and the impossibility that this entails. Abraham is called upon by God to kill his own innocent son. Abraham is thus asked to act against his own earthly ties of love and worldly laws without being given any reason. Although he knows that such an act would make him a murderer and a traitor to family loyalty, Abraham cannot resist the voice of God: it is both unknowable and undeniable.<sup>84</sup> Derrida argues that ethical responsibility is exactly this: being called upon to make a painful, terrible sacrifice without knowing why.<sup>85</sup>

“Day and night, at every instant, on all the Mount Moriahs of this world, I am doing that, raising my knife over what I love and must love (p.68)...and I can never justify this sacrifice. (p.70).”

Where Habermas and Rawls are keen to show that none are necessary, Derrida reintroduces metaphysics as a crucial element of law and ethics. In making legal

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<sup>82</sup> Derrida (1996) *supra*, n.15, p.57

<sup>83</sup> Levinas (1998) *supra*, n.22, p.110

<sup>84</sup> *Ibid.*, p.58-9

<sup>85</sup> *Ibid.*, p.67-8

and ethical decisions, we are asked to make sacrifices by an authority that we cannot understand. for reasons that we cannot fully thematise. How else, one might be resigned to ask, can we explain the difficulty in providing a moral justification for the special attention given by the U.S. and U.K. to Iraq in the winter of 2002/3 over other states that arguably posed a security risk or abused human rights at that time? Complete justification is impossible because, like religious faith, the ultimate foundation of a judgment is secret: the act of judgment takes place over an abyss.<sup>86</sup> Elsewhere Derrida describes ‘justice’ in similarly mystical terms. “Justice is an experience of the impossible”: any legal rule that is produced after reflecting upon the demands of justice can never be fully just because while the demands of justice are infinite, law is necessarily finite.<sup>87</sup> Deconstruction is only possible because there is always a gap between the demands of justice and the possibilities of law.<sup>88</sup> Such explicit reference to a non deconstructable metaphysics of justice may seem to fit awkwardly with the idea of *différance*, which purports to unwind *all* logocentric logic. Balkin argues that such a separation of ‘justice’ from representations of it in language is crucial in allowing a space for meaningful ethical discourse.<sup>89</sup> We deconstruct, not just because we can, but because we are driven to do so by the inexhaustibility of justice. “Value” is not a noun, but a verb – justice requires us

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<sup>86</sup> Derrida (1996) *supra*, n.15, p.86

<sup>87</sup> Derrida, ‘Force of Law: The Mystical Foundations of Authority’ in Cornell (1992) *supra*, n.80, p.16 and also in Derrida (2002) *supra*, n.80, p.242

<sup>88</sup> *Ibid.*, p.15

<sup>89</sup> Balkin, J.M. *Transcendental Deconstruction, Transcendent Justice* (1994) 92 Michigan Law Review 1131 at p.1139



to be creative in our attempts to build just institutions and address injustice.<sup>90</sup> The ethical-deconstructive metaphors are not deployed in order to claim that the subordination of the Other can ultimately be ended. Rather, they suggest that the relationship between Self and Other is one which can and must be rethought and indeed re-rethought.

## 5. The Other's Undecidable Position in Ethics and Representation

While Douzinas's reading of *Antigone* leaves the structures of injustice engendered by law intact, Levinas's self-refuting scepticism actually provides a basis from which to tackle the problem of the ethics of otherness. Building upon the above discussion, this final section proposes an approach to breaking down the exclusion of the Other through a reading of two ancient stories.

### 5.1 *The Other Within/Without: The Death of Narcissus*

The myth of Echo and Narcissus involves a beautiful young man, Narcissus, who is punished for his vanity and cruel rejection of the nymph, Echo, by being cursed to fall hopelessly in love with himself. Hughes's translation reads: "Let Narcissus love and suffer, as he has made us suffer. Let him, like us, love and know it is hopeless."<sup>91</sup> The curse is his doom, as he wastes away staring at his

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<sup>90</sup> *Ibid.*, p.1131

<sup>91</sup> Hughes, T. (1997) *supra*, n.5, p.78. Innes's translation in Ovid (1955) *supra*, n.5, p.85 reads: "May he himself fall in love with another, as we have done with him! May he too be unable to gain his loved one!"

image reflected in a forest pool. At face value this story does not appear to hold very much scope for lessons in ethics or legal judgment: Narcissism is commonly understood as a turning in on oneself and away from others. However, the spell cast upon Narcissus is both a curse and a gift. He is made to suffer, certainly, but he is also made to love. This excruciating combination is a metaphor for the impossible yet irresistible call of the Other.

Narcissus is cursed to fall in love with his own reflection because he is already in love with himself in a more common sense: he “had a beauty that broke hearts”<sup>92</sup> and a pride that made him reject and humiliate the many others who fell in love with him. Before he is cursed, Narcissus exists in a state in which he recognises only Self – his own self. All others he reduces to repetitions of the same sad rejection. Otherness exists for Narcissus as undifferentiated, bland and absent from his own concerns. He could have anyone he wished for, but he is convinced that he can find all that he needs within himself. It certainly appears that the only person who could be attractive enough to snare Narcissus is himself. It is only after he is punished for this attitude by this being made literally true that he comes to appreciate the importance of otherness as excessive of himself. In this sense, Narcissus’s curse is also a gift. In his reflection, he finally sees that which those who fell in love with him had always seen, but that he has himself never seen before: the mysterious imperative embodied in a singular, untouchable image. In his reflected image Narcissus appreciates the otherness within himself – that part that he is now doomed to always long for and yet will never conquer. Every attempt to reach it simply disturbs the water and of course destroys the image.

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<sup>92</sup> Hughes, *ibid*, p.74



causing him to despair. In forever trying and failing to grasp and hold his reflection, Narcissus is demonstrating that relationship of simultaneous imperative and mystery that Derrida locates in (Kierkegaard's reading of) the parable of Abraham and Isaacs. It is the incessant play between presence and absence that brings about the possibility of ethics. The Other is present to Narcissus inasmuch as he knows that it is within him and he can see it there in front of him, within touching distance. On the other hand it is absent from him as he cannot touch it. It does not satisfy his desire, existing only as an image that vanishes when he leaves or disturbs the water. And without his reflection to admire, Narcissus has no identity of his own at all. Presence and absence in its traditional order as sustaining the prioritisation of Self and Other is seen to be ruptured.

The intertwining of Self and Other is represented in the story in various ways. In Ovid's writing, we perceive Narcissus as a poetic negotiation between his own image and his surroundings. The description of the perfect pool in which Narcissus sees his reflection echoes his own aloofness from the world:

“No shepherd had ever driven his sheep  
 To trample the margins. No cattle  
 Had slobbered their muzzles in it  
 And befouled it. No wild beast  
 Had ever dashed through it.”<sup>93</sup>

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<sup>93</sup> *Ibid.*, p.78; A point suggested by Hinds, S. ‘Landscape with Figures: Aesthetics of place in the *Metamorphoses* and its Tradition’ in Hardie, P. (ed.) *The Cambridge Companion to Ovid* (Cambridge: Cambridge University Press, 2002) p. 133

Once enslaved by the curse, Narcissus's sudden connection with another entity that exists beyond his own body is represented in his violation of the virginity of the pool when his tears break up his reflected image.<sup>94</sup> Further, the reader is invited to imagine Narcissus by the pool as "a fallen garden statue".<sup>95</sup> As Hinds remarks, the landscape "has made him its own":<sup>96</sup> as an aesthetic image, Narcissus has ceased to be a self-identical, intact, sensuous creature. Like Marx's commodity, he has taken on an identity that goes beyond the limits of his own sensuousness and is disseminated within the wider landscape. Realising that his life is wasting away, Narcissus prays that the one he loves might be freed from himself: "The one I loved should be let live – He should live on after me, blameless. But when I go – both go."<sup>97</sup> Narcissus knows that he is doomed to die, and in at last accepting his mortality, he takes responsibility for his death. His concern that the one he loves should not die with him is an ethical one in Derrida's conception of ethics. The duty to be ethical towards the Other is both unconditionally demanded and impossible to fulfil. Narcissus dies wishing that his reflection could be separated from him, not only to satisfy his own desire for love, but because he perceives the injustice inflicted upon this innocent Other through his death. The absurdity of this concern – at once selfish and selfless –

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<sup>94</sup> See Hinds, *ibid.*

<sup>95</sup> Hughes (1997) *supra*, n.5, p.79; Innes translation reads: "a statue shaped from Parian marble" p.85

<sup>96</sup> Hinds in Hardie (2002) *supra*, n.94, p. 137

<sup>97</sup> Hughes (1997) *supra*, n.5, p.82; Innes's translation at p. 86: "I could wish that the object of my love might outlive me: as it is, both of us will perish together, when this on life is destroyed."



accentuates the mysterious and impossible demand of otherness. Referring again to Derrida, ethical responsibility for Narcissus comes from the realisation of his own doomed mortality and the singularity of otherness – from the gift of death. Alternatively, Narcissus's relationship with his reflection could be viewed in terms of Levinas's comments on the physical suffering of making oneself vulnerable to the other. Prior to the curse, Narcissus does not allow himself to be exposed to anyone. He "kept all his admirers at a distance" to the extent that "none dared be familiar, let alone touch him".<sup>98</sup> But the curse compels him to allow the Other to "torture"<sup>99</sup> him: to make him feel pain, to make him weep and beat his chest, eventually allowing himself to die rather than leave the pool. Narcissus is truly held hostage by his reflection, and despite his prayers his reflection is also held hostage by him. The point is that the unique, doomed relationship between Narcissus and his reflection is a metaphor for the interminable movement towards the Other. As the later, more hopeful Douzinas says, the Other is the internal exile of the Self and hence the source of ethical concern.

As Narcissus agonisingly experiences it, the Other occupies a space that is both inside and outside. It hurts and abuses him and makes demands that are impossible and yet irresistible. As Levinas has said, an ethical regard is only possible through such a physical encounter. The experience of the ethical is the experience of its absence: Narcissus is aware that he wants to be ethical towards his Other in not killing it. His concern is an ethical attitude: an awakening to the

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<sup>98</sup> Hughes, *Ibid.*, p.75; Innes translation at p. 83 "...his soft young body housed a pride so unyielding that none of these boys or girls dared to touch him."

<sup>99</sup> Hughes, *Ibid.*, p.82

injustices suffered by those that are beyond reach. In law, it is in the very the experience of interpreting the principles for judgment that this agony of the internal Other is made known. In deciding a case in which principles clash, a judge cannot avoid an injustice any more than Narcissus can avoid the death of his beloved. But it is at this point that we remember Goodrich's mourning widow: although we can never bring the Other back to life, our reconstruction of the Other can always be different. To succeed either in saving the Other from tragedy or banishing them to pure externality would be to achieve the impossible. Either the curse on Narcissus would be broken, leaving him once again entirely unconcerned for all but himself, or else his wish to be physically separated from it would be granted. To understand that both of these eventualities are impossible is to understand my argument about the ethical relationship between Self and Other in the legal judgments. The curse can never be broken or the Other separated from Narcissus without destroying him because the Other – his reflected image – is simultaneously rooted within his identity and also excessive of that identity.

However, it should not be forgotten that when Narcissus finally dies his corpse vanishes, leaving only a flower, composed of “a ruff of white petals round a dainty bugle centre, yellow as egg yolk”.<sup>100</sup> If one wanted to argue that the story should be read as suggesting the possibility of the separation of Self and Other, it might be suggested that this flower, left behind in the world, represents the fulfilment of Narcissus's wish that his beloved is allowed to live on, blameless. But if this is truly a separation, it has only been achieved through the destruction of the Self. Just as we cannot be separated from a vital organ

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<sup>100</sup> Hughes, *Ibid.*, p. 84



without fatal consequences, so the separation of Self and Other in *Antigone* and *Echo and Narcissus* necessarily involves disaster. King Creon's execution of Antigone leads to the eventual destruction of both himself and the house of Oedipus. It should be noted that the disappearance of Narcissus's body is preceded by his being sincerely mourned by the very ones whom he had previously spurned, including the nymphs and the unfortunate Echo. The beautiful flower, which still exists, might be thought of as returning to the world to stand in for the beauty of Narcissus himself that is lost to Echo and the other nymphs. Each of these cases of mourning represents the haunting, spectral presence of the Other in the realm of the Self: forever lost but not absolutely absent.

### 5.2 *Justice as the Other: The Defeat of the Sly Fox*

There is another kind of death that allows us to appreciate the ethical significance of undecidability in the relationship between Self and Other. This is the death of the villain, and crucially, the means used by the hero to bring this death about. Like most tales of its kind, *The Sly Fox and the Little Red Hen* is overtly moral in tone, and simplistically so. A superficial interpretation of the victory of the little red hen over the sly fox suggests that 'right' and 'wrong' are signified by a straightforward identification of the good traits in the hen proving superior to the bad traits of the fox. In other words, 'good' and 'bad' are identical with the respective characters of the story. However a careful reading of the story shows that justice is itself other to this binary polarisation. As this

section argues, such a reading allows us to deconstruct the exteriority of otherness in representations of justice and injustice.

The story opens by introducing the two characters. In the description of the hen, we learn of an independent and inoffensive little creature who “lived all by herself, in a little house in the woods”.<sup>101</sup> The fox on the other hand “lived with his mother, in a den”.<sup>102</sup> As a young male presumably dependent on his mother, we are invited to suppose that, unlike our capable little red hen, the sly fox is in certain ways deficient and inept. Furthermore, his salient attribute is that he is “sly”. Like all cowardly villains, lacking any proper or praiseworthy qualities, he is characterised by deviousness. While the little red hen is naturally industrious and honest, the fox lacks these good qualities, and is deficient in natural goodness or strength of character. As the story begins to develop, we see the sly young fox plotting to catch the little red hen. In a reinforcement of the strength of the moral binary hierarchy between hen and fox, we learn that the latter “tried many, many times to catch her” but “not one of the sly fox’s plans worked”.<sup>103</sup> In other words, the fox’s slyness is no match for the hen’s quiet dignity. The little red hen represents the values that we are supposed to respect and wish to see flourish, while the fox represents everything that is morally weak. In his repeated failure through his own inability to live rightly, the fox signifies all that is other to the good.

However, the purpose of this reading is to show that the ethical is located, not in identifying the distinction between prioritised self and

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<sup>101</sup> Traditional (Southgate) (1973) p.4, *supra*, n.6

<sup>102</sup> *Ibid.*, p.6

<sup>103</sup> *Ibid.*, pp. 8-10



subordinated other, but in the undermining of that distinction. Towards the end of the story, the fox finally manages to trap the hen. He puts her in a bag and takes her home for his mother to cook. But on the way home the day is hot and the foolish fox makes the ultimately fatal mistake of taking a nap half-way leaving the bag open, allowing the hen to escape. But before she leaves, she decides to make sure that the fox is never able to threaten her again. “The little red hen then picked up some big stones. She put the stones into the bag. Then back home she ran.”<sup>104</sup> This is where the story gets interesting, deconstructively speaking. Why would the simple and honest hen pause to put heavy stones into the bag before leaving the scene? The fox is snoozing just a few feet away. The operation would be no small task for a little hen who should be terrified by the kidnapping and even more so by the possibility that the fox might awake. The hen would not be disposed to hang about. She is not vengeful or deceitful. She just wants to mind her own business and be left alone in her little house in the woods. Why does she therefore not do the simple and sensible thing and run away immediately, and make sure to be more vigilant next time? Could it be that the hen is being *sly*? Surely not, for, as we have been consistently reminded, it is not the hen but the fox that has this dishonourable attribute. But the story is a fairy-tale and as such must end with the demise of the obviously bad character at the hands of the good, so what else can the hen do? One might suggest that it is at this point that the story breaks free of the grasp that its author had on it until now. The narrative is driven by the necessity for a final, conclusive knock-out blow and thus make the text meaningfully comment on the just deserts of the two characters. When the fox awakens, unaware of the hen’s escape, he

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<sup>104</sup> *Ibid.*, p.40

takes the bag home to his mother who has been boiling the water. When the stones are dropped into the pot the boiling water splashes onto the sly fox and his mother, killing them both instantly. Assuming she intended this end for the foxes, our little red hen has solved her problem in a brilliantly sly fashion. She has beaten the fox at his own game. Good has triumphed, but at what cost to the story's moral coherence? Good has defeated bad by embracing a crucial distinguishing attribute of the bad. If the meaning we have settled on for justice is, as stated above, that the good, hard-working person who minds his own business will succeed at the expense of the devious and sly then this is a problem. Honesty's purity is infected by slyness and what the fable tries so hard to retain as the realm of the good is there-by invaded by the bad. In Derrida's terms it is "traced" through by its excluded Other. If the hen can act in this cool sly way in the face of such danger it would seem that the story's foundations of good and bad unravel, because slyness is seen to be a quality both of the hen and the fox.

As the story of the *Sly Fox* shows, justice cannot be unproblematically contained within the confines of a determinate identity. In the story of the Sly Fox, the rupture of this assumption is a gesture towards the singular experience of justice. The narrative sets up the characters of the little red hen and the sly fox as moral opposites, but in forming a neat binary, in which the former is prioritised, this relationship does not recognise otherness as an ethical imperative. It is justice itself that is the other in this story, since, taking its form from both parts of this binary relationship, it cannot neatly fit into either mould. But whilst leaving its mark on both sides, nor can justice simply embrace both honesty and slyness. Its place vis-à-vis the story's narrative is, in the end,



*undecidable*. Through this reading, the killing of the sly fox finds its place amongst the deathly deconstructive metaphors discussed above. Justice is that which is beyond representation and categorisation, which calls us to be ethical without allowing itself to be fully understood.

## 6. Conclusion

Our readings of Narcissus and the Sly Fox, emphasising that the force of the other's call lies in its being both external to and also embedded within the self, allow us to read a convincing imperative into the voice of the Other. The fate of Narcissus is thus a metaphor for the Other, both as part of our ethical consciousness and at the same time separate from us, insofar as we can never truly claim it as our own. It interprets Derrida's characterisation of the ethical as the impossible choice – the “trembling” – and indicates why it is not possible for us to ignore the Other. If the Other is, as Douzinas has argued, absolute exteriority then there is no possibility for a movement towards ethics within law. The Other as simultaneously present and absent – prone to both philosophical and metaphorical operations – allows for re-descriptions and reinterpretations that are not purely exterior and oblivious to each other. Principles are interpreted according to one set of metaphors and rhetorical turns and then according to another. Interpretation constantly shifts because we know that the Other – the infinite and untotalisable within each judgment – will always escape us. The only certainty from this perspective is that to forget about otherness is unethical. This is the forgetfulness of discourses of law and ethics that make judgments according to a self-same identity: who is more reasonable?

Who is more rational? By such uncritical reductions, otherness faces assimilation to the identity of the self or else exclusion from its moral reach.



## Conclusion

The scope of this work has been broad. In this final part I hope to draw together some of the salient points of the thesis through a brief discussion of its general implications for legal scholarship and by responding to some possible criticisms. These remarks should not be regarded as an attempt to provide a solid justification for the theoretical manoeuvres of the thesis or to pre-empt discussion. Being concerned primarily with the act of interpretation, the idea here is to give an interpretative after-word on the central arguments raised and also an indication of where I regard this work in relation to the wider context of academic writing.

### *1. Implications for Legal Scholarship*

As noted in the body of this work, there are those who would discard philosophical perspectives on legal and political critique in favour of supposedly more relevant sociological ones.<sup>1</sup> It has been an important objective of this thesis to demonstrate that analysis of philosophical theorisations of principle and its operation with legal rhetoric has a crucial role to play. I would suggest that this role is both descriptive and prescriptive. The thesis has identified how decisions of judges incorporate liberal philosophical content in their interpretations of ‘facts’<sup>2</sup> and how certain legal principles – themselves in part

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<sup>1</sup> See Chapter Two, s.4.

<sup>2</sup> ‘Facts’ appears in quotation marks here because our preoccupation is with the construction rather than mere identification of factual situations in the legal judgments.

produced through the writings of philosophers of the Eighteenth Century onwards – are interpreted in the light of these interpreted ‘facts’. Also, by examining the ethical implications of the way in which liberal principles are deployed in order to draw moral distinctions<sup>3</sup> a critical evaluation of the role of principle has been made possible. Such a study stands in need of careful analysis of the philosophical foundations of liberal principle, and in the context of the cases of *Hindley, Thompson and Venables* and *Re A*, this is what my thesis aims to contribute. Of course, such a pronouncement relates only to the general significance of my attempt to present a critique of the philosophical content of the rhetoric of legal judgement. The specific significance of my observations and arguments lies in the particular relationships identified between the critical concepts wielded in this work. For instance, the identification of liberal principle as determined by a relationship of mutual inter-dependence with matters of contingency is made through a very particular interpretation of the language of the judgments and theorisations of liberal principle. Concentrating upon the legal judgments for a moment, the precise interpretation of the relationship between principle and contingent consequences required attention to the reasons for certain decisions by the judges. Why, for instance, did the judges of the Court of Appeal in *Re A* regard Mary and Jodie as conflicting individuals instead of a unified entity? Why, secondly, did the judges in the murder tariff cases regard the parties’ claims to have lacked responsibility so differently? The thesis has set out to answer these questions by examining the link between legal judgment and liberal normative principle. It

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<sup>3</sup> For instance that between Jodie and Mary, and also between Hindley and the Bulger killers (see Chapter Four).



has been argued that liberal theorisations of the ‘individual’ as the bearer of certain essential qualities of reasonableness, rationality and self-consciousness are employed as tools for interpreting the ‘facts’ of the cases in a way that allows for an escape from ethical dilemma. The argument has been made that when liberal principles clash or the correct legal interpretation of a principle is unclear, then the liberal notion of the ‘individual’, interpreted in the light of calculations of benefit and detriment, provides a means for morally prioritising one party over another. In the final chapter, it was argued that the moral hierarchy of Self and Other engendered by this combination of the liberal idea of the individual and consequentialist calculations in legal rhetoric is actually reinforced by the radical Postmodernism of Costas Douzinas. Our foray into deconstruction has attempted to show that there are two critical approaches open to us. The first is the approach that legal rhetoric shares with Douzinas: Self and Other as identities that correspond to the qualities of justice and injustice. On this approach, the identification by legal rhetoric of justice with Self leads towards decisions such as *Re A, Hindley* and *Re Thompson*, which morally prioritises its subjects according to an assessment as to which party most closely resembles the liberal individualistic ideal. Douzinas’s perspective critiques this hierarchy by simply turning it on its head: justice, embodied in the character of Antigone, becomes identified with all that is *Other* to law. My own argument is that the moral hierarchy may actually be partly dissolved by showing how the moral qualities of justice are not merely other to law, but rather *excessive* of it, and, furthermore, excessive of a simple identification with either Self or Other.

## *2. Criticisms and Responses*

Any work that attempts to incorporate both theoretical and legal interpretation must, to a greater or lesser extent, make certain decisions as to the extent of its scope and the integration and deployment of these aspects. As noted above, discussions of the philosophical foundations of liberal theory focus upon the characteristics of the ‘individual’ as a moral and legal actor. The deontological universality of matters of principle requires such an idea in order to be able to assume that persons can be held accountable for their actions, and that cases can be interpreted as problems of conflicting rights. Such a perspective on the theory and the judgments provides the necessary foothold for the introduction of deconstruction in Chapter Five. Since deconstruction seeks to locate and disrupt the logocentrism of western thought, the identification of the liberal idealisation of the ‘individual’ within legal judgment makes this – and further critique from an ethical point of view – possible. A criticism of my approach would be that this identification makes such critique too easy: that my reading of the cases as using liberal notions of individuality interpreted in the light of consequentialism in order to escape from ethical dilemma, sets up a scenario simply to be knocked down again. I would reply that this would only be fair criticism of my thesis if the argument in Chapter Four (that makes the connection between judgment and liberal theory) can be described as forced or unconvincing. I would contend that this is not so, and hope that my analysis of the language of the judgments persuasively illustrates the connection between liberal principle and contingent consequences within legal rhetoric.



However, I believe that my approach is open to legitimate (though at least partly answerable) criticism in terms of its theoretical purpose. This criticism is linked to the choice to use deconstruction as the main theoretical perspective in the last three chapters. The question is this: Is the relationship (identified in Chapter Four) between principle and context a *discreet* relationship, or does it signify a *general* state of affairs? The question of whether my argument claims to introduce a theory of legal judgment, or whether the cases are simply read and interpreted as independent moments of law and ethics is not addressed directly in any part of the thesis. Certainly there is no detailed comparative analysis of other judgments, and in the instance of *Re A* at least, it is difficult to imagine a case that would qualify as being of a sufficiently similar ‘type’ for meaningful comparison. If, however, the argument is intended to convey a certain view of the role of principle in law generally then could it be that it has unhelpful implications for legal criticism? After all, if the general implication of Chapter Four is that core liberal principles have no practical meaning of their own, then surely the important issue of law’s ethical content is ‘up for grabs’ in the Postmodern sense. Such an interpretation might be thought to be confirmed by my choice to concentrate on Derrida and deconstruction in developing my analysis in the last three chapters. Why not adopt, for instance, a Semiotic or Structuralist approach, which would open up opportunities for exploring the meaning and role of liberal principles in terms of binary oppositions and differences, without having to deal with the further problem of undecidability and *différance*? Does the choice to concentrate upon deconstruction pose unnecessary difficulties?

I hope to have met both objections. First, the cases are examined following a discussion of the possibility of deriving (as Rawls and Habermas try to) a post-metaphysical universal approach to liberal normativity. Inasmuch as the argument of Chapter Four attempts to show that these cases could not render an unproblematically universal judgment, the implication is that in this particular instance at least, there is reason to think that the project of liberal universalism itself meets with serious difficulties. This does not imply a descent into freeplay of equally irrational ideas, but rather a critique of universality as an aspiration of postmetaphysical liberalism. Hence, Chapter Four ought to be construed, not as an attempt to simply undermine legal or ethical certainty, but as a study of the conditions in which principles can be put into operation in law. Secondly, there is the choice to concentrate upon deconstruction in developing the examination of rhetoric. That deconstruction makes certain fascinating illuminations of the relationship of principle and context possible is not in doubt, even if, as shown in Chapters Five and Six, it carries very heavy theoretical baggage, both in terms of its ‘strategies’ and also the controversies of its relationship to political and moral philosophy.

I would accept that the decision to concentrate on deconstruction rather than possible alternative theoretical paths raises certain questions as to the emphasis of my argument. It is for this reason that Chapter Six is given to a discussion of the very question of deconstruction’s implications for philosophy and political theory. Although the point is not definitively settled there (and I submit that it would be foolish to suppose that it could be) I hope to have shown some awareness of the critical debates surrounding the issue. It is deconstruction’s problematic aspects that help us understand and set into



context the implications of Chapter Four's argument. Chapter Six's examination of the critical significance of deconstruction therefore ought not be regarded as a diversion from the central question of liberal principle in law, but as a necessary stage in the development of the thesis. By addressing the criticisms of deconstruction in this way, and illustrating (in Chapter Seven) a possible useful application for deconstruction for ethical critique, I hope to have shown how it can be relevant to legal theory.

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